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1912.

THE

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AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

In the Estate of TITO HECTOR GRAHAM TOSCANI, Deceased.

1911
Nov. 20.

Probate—Renunciation—Executor—Alternative Capacity—Creditor—Grant de bonis non (with Will annexed).

A renunciation, in common form, by the sole executor under the will of a deceased testator, having been filed, a grant of administration, with the will annexed, was made to the testator's mother, the residuary legatee named in the will. She died, leaving part of the estate unadministered. The Court permitted the person who had been named as sole executor, and who had renounced, to take, in his capacity of creditor, letters of administration de bonis non, with the will annexed.

The enforcing of r. 50 of the Rules and Orders, 1862 (non-contentious business), is in the discretion of the Court. (1)

This was a motion by Charles Andreae as creditor, for a grant of letters of administration with the will annexed of the estate

(1) Rules, Orders, and Instructions for the Registrars of the Principal Registry of Her Majesty's Court of Probate, made under the provisions of the statutes 20 & 21 Vict. c. 77 and 21 & 22 Vict. c. 95, in respect of *non-contentious* business:

Rule 50 is as follows: "No person

1911

TOSCANI, IN THE ESTATE OF.

of the deceased, the applicant having been appointed sole executor of the said will, but having renounced in that capacity.

The material facts were as follows.

Tito Hector Graham Toscani died on December 4, 1910, at 14, Sackville Street, Piccadilly, having duly executed his last will on December 1, 1909, wherein he appointed Charles Andreae sole executor. Charles Andreae renounced probate, and on February 9, 1911, letters of administration with the will annexed were granted to Letitia Toscani Weeks, widow, mother of the deceased and residuary legatee under the said will.

On August 28, 1911, Letitia Toscani Weeks died intestate and without any known relative, leaving unadministered assets of the estate of Tito Hector Graham Toscani valued at 1295*l.* 14*s.* 2*d.*

A citation was issued on behalf of Charles Andreae as creditor calling upon the next of kin (if any) and all persons having an interest in the estate of the mother of the deceased to accept or refuse letters of administration with the will annexed in respect of the unadministered portion of the estate or shew cause why the same should not be granted to the applicant as a creditor, and the next of kin were advertised for; no appearance to the citation was entered, and no replies were received to the advertisements, and the Solicitor for the affairs of His Majesty's Treasury had intimated that he had no intention of interfering.

The applicant was a creditor to the estate of Tito Hector Graham Toscani to the amount of 1149*l.* 13*s.* 8*d.*

Willock, for the applicant, moved for a grant to him as a creditor, notwithstanding that he had renounced in his capacity of executor.

[BARGRAVE DEANE J. There is a case of *In the Goods of Samuel Richardson* (1), where the Court refused to allow one of the residuary legatees in trust to retract his renunciation in that character, for the purpose of taking administration with the will annexed in respect of the estate then unadministered.]

---

who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character."

(1) (1859) 1 Sw. & Tr. 515.

1911

TOSCANI, IN THE ESTATE OF.

Although the applicant cannot retract his renunciation as executor he can take a grant in the capacity of creditor. He has never renounced in that capacity.

[BARGRAVE DEANE J. referred to *In the Goods of Robert Morrison* (1), where the rule in *In the Goods of Samuel Richardson* (2) was followed, and the Court refused to allow retractation by the applicant as residuary legatee in trust, but granted him administration de bonis non as substituted residuary legatee.]

In the Goods of Charles Apthorp Wheelwright (3) is sufficient authority for the present application. It was argued in that case that the enforcing of r. 50 is in the discretion of the Court. (4)

BARGRAVE DEANE J. In this case the applicant has never renounced as creditor, and therefore he may take a grant in that capacity.

Solicitors for applicant: *S. B. Cohen, Dunn & Co.*

(1) (1861) 2 Sw. & Tr. 129.
(2) 1 Sw. & Tr. 515.
(3) (1878) 3 P. D. 71.
(4) See note (1), ante, p. 1.

H. D. G.

1911
Dec. 4.

SCOTT (otherwise MORGAN) *v.* SCOTT.

Nullity—Hearing in Camera—Decree Nisi—Publication—Contempt of Court—Motion to Commit—Costs.

Publication of the evidence taken in a suit heard in camera is not permissible and may be punished as a contempt of Court.

This was a motion, on behalf of Kenneth MacKenzie Scott, the respondent in a nullity suit, that Annie Maria Scott, otherwise Morgan, the petitioner in the said suit, and Percy Braby, her solicitor, be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of the cause on June 13, 1911, which, the notice of motion stated, was "in contravention of an order, dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the petitioner and the said Percy Braby be restrained from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause, or from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that the petitioner and the said Percy Braby be directed to state on oath the names of the persons and their addresses to whom similar communications had been made; and that the petitioner and the said Percy Braby respectively be ordered to pay to the respondent his costs, as between solicitor and client, of and relating to this motion.

The notice of motion was dated November 23, 1911, and was addressed to Annie Maria Scott and to Percy Braby, and also to a partner of the latter, but at the hearing it was stated, and admitted, that the partner had, in fact, no part in the matter.

The material facts and dates were as follows:—

The petitioner and respondent went through the ceremony of marriage in July, 1899, and the petition for nullity on the ground of the alleged impotence of the respondent was presented by the lady on January 12, 1911.

On February 14, 1911, an order for medical inspection of the parties was made, and the order further directed that the case should be heard in camera.

The respondent had entered an appearance in the suit and filed an answer admitting that the marriage had not been consummated but denying that he was impotent.

The petitioner attended for medical inspection, in pursuance of the order, and she was reported to be virgo intacta.

The respondent did not attend for inspection.

On April 28, 1911, the answer of the respondent was, by leave and with consent, withdrawn.

The case was heard before the President (Sir Samuel Evans) in camera on June 13, 1911, and a decree nisi was then pronounced, on the ground of the respondent's impotence.

Bayford, for the respondent, in support of the motion.

Barnard, K.C., and *W. O. Willis*, for the petitioner. Assuming that the petitioner has done something which the Court has ordered her not to do, the application is wrong in form: the application should, in such a case, be for attachment, not to commit.

The order of February 14, 1911, was, as to the first part, appointing medical inspectors, and as to the second part, that the case should be heard in camera. There is nothing in the order directing that the petitioner shall not do any particular thing: there is nothing in it directing her not to inform any one of what takes place at the hearing.

[BARGRAVE DEANE J. What is the object of ordering the case to be heard in camera?]

These cases are heard in camera because the details cannot properly be heard in public. A petitioner in such a case could not give the evidence in open Court. But if a petitioner who has obtained a decree of nullity and is being slandered or libelled cannot protect herself by stating the true facts and shewing that she is the aggrieved party, the restraint goes much further than is right and proper. In the present case the Court is not dealing with any general "publication." The transcript of the official shorthand writer's notes of the

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proceedings was sent only to the father and sister of the respondent and to one other person; and was sent, as her affidavit shews, solely for the purpose of vindicating her character and position, as the person aggrieved.

[BARGRAVE DEANE J. Is not that shewn by the decree?]

As to Mr. Braby, all that he did was to get a transcript of the official shorthand writer's notes and have three copies made, one of which he sent to the respondent's father, upon the instructions of his client, the petitioner. If either the petitioner or Mr. Braby have gone beyond what they had a right to do, they can only regret it. They acted in ignorance of any wrong-doing.

Bayford in reply.

BARGRAVE DEANE J. I am not sure that there has ever been a similar application. It is manifest that the reason for trying such unhappy cases as this in camera is the protection of both parties, inasmuch as the details of evidence are of a very delicate and private character. The medical evidence and the evidence of the petitioner in particular is of such a nature that it ought to be kept absolutely private and not disclosed to any one. The object, and the result, of the inquiry into the most intimate relations of the parties is to shew which of the two parties has caused the state of things which eventuates in the decree of nullity.

It not infrequently happens that the result is shewn to be not the fault, but the misfortune, of the respondent. There are cases in the books where people have been found impotent in relation to a particular person, though, apparently, not so in regard to others. I have in mind cases where both the parties have married again and had children.

One of the main objects of trying these unhappy cases in camera is that the evidence should be kept secret: the result may be made known, but none of the details may be published.

It is gross contempt of Court for people to go spreading about the country particulars of that which is done in camera. It is gross contempt of Court to report anything heard in camera. It is the same even in regard to reporting summonses heard in

chambers, or in Court as in chambers, which is, in effect, the same thing, unless by special leave of the judge.

In the present instance I am quite willing to believe that that which was done was done in ignorance. This lady, the petitioner, did it in ignorance: there is less excuse for the solicitor, Mr. Braby, who is an officer of the Court. But I will accept his excuse, too, that he did what he did in ignorance.

After to-day, however, there will be no excuse, either for parties or solicitors; and every one must clearly understand, from this time forward, that what is done in camera is not to be reported or published.

As I say, I accept the apologies and excuses of the petitioner and of Mr. Braby, her solicitor, in the present case; but, while I make no order upon the motion to commit them to prison, the costs must be paid by them jointly and severally.

Order accordingly.

Solicitor for Kenneth MacKenzie Scott (the respondent): *William S. Jerome.*

Solicitors for Annie Maria Scott (otherwise Morgan) (the petitioner): *Braby & Waller.*

H. D. G.

1911
July 28.

THE DUPLEIX.

Admiralty—Ship—Collision—Action in rem—Foreign Defendants—Arrest—Bail—Voluntary Appearance—Personal Liability.

The plaintiffs, owners of a British ship, commenced an action in rem and caused a vessel within the jurisdiction to be arrested in respect of a collision on the high seas. The owners of the vessel arrested were foreigners domiciled abroad. They appeared and obtained the release of their vessel by giving bail to the value of ship and freight. They then defended the action, denying their liability, and counterclaiming for the damage they had sustained by reason of the collision. The foreign vessel was found alone to blame, and judgment was pronounced in the usual form condemning the defendants and their bail in the amount of the damage sustained by the plaintiffs, together with the costs of the claim and counter-claim. The defendants moved to vary the decree by limiting it to the value of their vessel, freight, and costs:—

Held by the President (Sir Samuel Evans), following the principles laid down in the course of the judgment in *The Dictator* [1892] P. 304, approved by the Court of Appeal in *The Gemma* [1899] P. 285, that (apart from any application for a statutory limitation of liability), the appearance of the defendants being voluntary and their proceedings in the action amounting to a submission to the jurisdiction of the Court, they were personally liable to the full extent of the plaintiffs' proved claim.

Motion to Vary Decree.

The plaintiffs were the Anglo-American Oil Company, Limited, owners of the British barque *Eclipse*.

The defendants, and counter-claimants, were the owners of the French barque *Dupleix*.

On June 4, 1910, about 1.30 A.M., the weather being fine, and the wind south-easterly fresh, the *Eclipse*, a steel four-masted barque, belonging to the port of London, of 2969 tons net register, and manned by a crew of thirty-six hands, was in the South Atlantic, some 400 miles eastward of Pernambuco, in the course of a voyage from New York to China, with a cargo of case oil and wax. She was under all plain sail, close hauled by the wind, on the port tack heading about S.W. b. W. magnetic, and making about nine knots, when she came into collision with the *Dupleix*, a steel three-masted barque, belonging to the port of Nantes, of 1938 tons net register, and manned by a crew of twenty-three hands, from Port Victoria, South Australia,

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to Falmouth for orders, with a cargo of wheat. She was heading about N. b. E. magnetic, and with all sail set was making between eight and nine knots.

After the collision cargo was jettisoned by the master of the *Eclipse*, and, on June 7, the vessel put into Pernambuco, where some of the cargo was sold, and temporary repairs were effected to the value of 1500*l*. On July 24 the vessel left on her return to New York, which port she reached on September 1. She there completed the repairs necessary to enable her to continue the voyage.

On July 20, 1910, a writ in rem was issued by the plaintiffs, and the *Dupleix* arrested on arrival at Falmouth. The defendants entered an appearance and gave bail in the appraised value of the vessel, and for the agreed amount of the freight. They defended the action and counterclaimed against the plaintiffs.

On October 26 and 27, the action was tried by the President (Sir Samuel Evans), assisted by two of the Elder Brethren of the Trinity House, and, in the result, the *Dupleix* was found alone to blame for failing in her duty to give way to a close-hauled vessel. Judgment was accordingly entered in favour of the plaintiffs, and the decree, in the usual form, condemned the defendants and their bail for the amount of the damage sustained by the plaintiffs, and for the plaintiffs' costs on the claim and counter-claim.

On November 10, the defendants moved to vary the decree by limiting it to the value of the arrested ship and her freight, but, by consent, the arguments stood over pending the report of the registrar as to the amount of the damage sustained by the plaintiffs. The claim filed by the plaintiffs amounted to 24,000*l*. The value of the *Dupleix* and her freight was not more than 9900*l*., and the statutory amount for which the defendants would be liable if they limited their liability would be about 15,000*l*.

1911. June 26. *Laing, K.C.*, and *C. Robertson Dunlop*, in support of the motion on behalf of the defendants. The owners of the *Dupleix* are foreigners resident abroad who could not have been served with process in an action in personam. Their appearance to the action cannot be said to have been voluntary,

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as it was for the purpose of protecting their property in the hands of a foreign tribunal, and (apart from any application for limitation of liability under the Merchant Shipping Acts), the proceedings being in rem, whether the owners appeared or not, the remedy afforded cannot extend beyond the property proceeded against; that is to say, in an admiralty action in rem, though the defendants appear and contest the action, the plaintiffs cannot obtain judgment for, or recover, more than the value of the res, that is, the ship found to blame and which was arrested, and her freight—or the bail which represents the ship and freight—together with the costs.

The decisions in *The Dictator* (1) and *The Gemma* (2) will be relied upon by the plaintiffs: but those cases are not decisive, for they do not determine the point now raised, and the judgment in the first-mentioned case is based on a misconception of the early practice, as pointed out in Williams and Bruce's Admiralty Practice, 3rd ed. (1902), pp. 18 to 26, where the whole subject is exhaustively reviewed in support of the proposition that, though the defendants appear in an action in rem, they are not liable beyond the value of the res. It is submitted, therefore, that the judgment should be limited to the value of the defendants' ship and freight, and to the costs.

[Reference was made to the following cases: *The Bold Buccleugh* (3); *The Parlement Belge* (4); *The Longford* (5); *The Mullingar* (6); *The Volant* (7); *The Hope* (8); *The John Dunn* (9); *The Triune* (10); *The Dundee* (11); *The Khedive* (12); and to Clerke's Praxis (1743 ed.).]

Hugh C. S. Dumas (*Aspinall, K.C.*, with him), for the plaintiffs, the owners of the *Eclipse*. In the absence of proceedings successfully instituted by the defendants for limitation of liability under the Merchant Shipping Acts, the plaintiffs are entitled to judgment against the defendants personally and

(1) [1892] P. 304.
(2) [1899] P. 285.
(3) (1851) 7 Moo. P. C. C. 267.
(4) (1880) 5 P. D. 197.
(5) (1889) 14 P. D. 34.
(6) (1872) 1 Asp. M. L. C. 252.
(7) (1842) 1 W. Rob. 383.
(8) (1840) 1 W. Rob. 154.
(9) (1840) 1 W. Rob. 159.
(10) (1834) 3 Hagg. Adm. 114.
(11) (1823) 1 Hagg. Adm. 109.
(12) (1880) 7 App. Cas. 795, at pp. 813, 814.

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their bail for the full amount of the claim ascertained in the registry. The question involved in the case is covered by authority binding on this Court, for even assuming that, in strictness, the cases of *The Dictator* (1) and *The Gemma* (2) are not conclusive upon the precise point now raised, nevertheless, after an exhaustive examination of the cases by Sir Francis Jeune in *The Dictator* (1), that learned judge, in arriving at his decision, laid down a proposition which applies in this case, namely, that in a collision action in rem, where the defendants appear to contest their liability, and judgment passes against them, that judgment can be enforced against them to the full extent of the damage proved by the plaintiffs, and is not limited to the value of the res, or of the bail which represents the res. In *The Gemma* (2) the Court of Appeal held that the case of *The Dictator* (1) was applicable and approved and followed the statement of the law as to a person appearing in an action in rem becoming personally liable. The present motion should, therefore, be dismissed.

Cur. adv. vult.

July 28. THE PRESIDENT (SIR SAMUEL EVANS). This was a collision action. The defendants' ship was arrested. The defendants entered appearance in the action, and gave the usual bail. They defended the action, and also counterclaimed against the plaintiffs.

I found upon the trial that the defendants' vessel was solely to blame, and pronounced judgment in favour of the plaintiffs on the claim and counter-claim with costs. This entailed, in the ordinary course, a judgment against the defendants and their bail for the damages sustained by the plaintiffs, and for the plaintiffs' costs on the claim and counter-claim. The defendants, however, applied that the judgment should be so framed as to be limited to the value of the defendants' arrested ship and freight, and to the costs.

The proposition of the defendants was that in an admiralty action in rem, in which the defendants appear and contest the action, the plaintiffs cannot obtain judgment for, or recover,

(1) [1892] P. 304. (2) [1899] P. 285.

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more than the value of the res—that is, the ship found to blame, and which was arrested, and her freight or the bail that represents the ship and freight—together with the costs.

The plaintiffs opposed the defendants' application and asked for judgment against them personally and their bail for the full amount. They relied upon the cases of *The Dictator* (1) and *The Gemma.* (2)

The defendants argued that those cases did not determine the point now raised, as they were not decisions directly upon the point. Speaking strictly, it may be true that those two cases are not binding decisions upon the matter in question, but in *The Dictator* (1), after an elaborate examination of the authorities, Sir Francis Jeune stated that the law was that in a collision action in rem, where the defendants appeared to contest or reduce their liability, judgment passed against them, and could be enforced against them to the full extent of the damages proved by the plaintiff, and was not limited to the value of the res or of the bail which represented the res. In *The Gemma* (2) the Court of Appeal approved of that statement of the law. In the course of his judgment A. L. Smith L.J. said (3): "Now, apart from authority, it appears to me that when persons, whose ship has been arrested by the marshal of the Admiralty Court, think fit to appear and fight out their liability before the Court, the form of the proceedings in the Admiralty Court shew—and it is not disputed that the forms I have referred to are those which have been in use, according to the practice of the Court, from olden times—that the persons so appearing, as the defendants have done in the present case, become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced in rem, becomes a personal action against the defendants upon appearance. For what purpose does a party appear to an action in rem? There are, as it seems to me, three reasons for the appearance: first, to release the ship, so that it may go on trading for the owner; secondly, to contest the plaintiffs' allegations that the ship had been in default; and,

(1) [1892] P. 304. (2) [1899] P. 285.
(3) Ibid. at p. 291.

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thirdly, in order to prevent its being sold. The President, in a judgment full of learning and research, in which he dealt with all the cases from the earliest time, whether in conflict or not with each other, has held in the case of *The Dictator* (1) that a person appearing in an action in rem becomes personally liable, and considering that no real argument was addressed to us to impeach this judgment, and having considered it, and the principles appertaining to the present case, I do not doubt that the President came to the correct conclusion, and I adopt it."

In that case, as in the present one, the owners were foreigners domiciled abroad, who could not have been served with process in an action in personam.

Whether the two cases referred to were decisions directly in point or not, it would not be respectful for me to disregard the elaborate and precise statement of the law to be found in the judgments and to treat them as obiter dicta, even if I ventured to hold views differing from them. Where general principles of law have been laid down by learned judges in considered judgments, it does not appear to me to be right, or in the public interest, to look minutely at the facts of the particular case and to say that the case might have been decided on narrower grounds, and that the general principles need not have been enunciated, and that, therefore, they are to have no judicial authority. In saying this I do not wish it to be supposed that I hesitate to adopt the views expressed by the learned judges in the two cases referred to. On the contrary, having given my best consideration to the question, I desire humbly to express my concurrence in them without reservation.

Regarding the matter historically and legally, the form of judgment, which has been adopted for generations, where owners appear in an admiralty action in rem, whether in cases of collision or otherwise, is right in fixing liability upon the owners personally to the full extent of the claim established in the action.

The origin of commencing admiralty suits by arrest is stated, I believe correctly, in the volume of the Selden Society series containing Select Pleas in the Court of Admiralty (vol. 1, p. lxxi.) in the following passage:—"The ordinary mode of commencing

(1) [1892] P. 304.

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the suit was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant, and were within the admiral's jurisdiction at the time of the arrest. . . . . Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited 'at'—apud—the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the res."

Moreover upon general principles applicable to the effect of entering appearance, I think that where the defendants appear, as in this case, not only to obtain the release of the ship which happens to have been arrested, upon giving sufficient bail, but also to contest their liability, and to endeavour to exonerate themselves from any claim for damages, and further to put forward, by counter-claim, and try to establish a claim for damages against the plaintiffs, they submit themselves to the jurisdiction of the Court, and thereby become liable personally for the full damages.

It is no doubt true that the law as to the effect of appearance in the Courts of this country by foreigners, or in the Courts of foreign countries by our citizens, where the appearance is not voluntary, is not clearly settled. In *Schibsby* v. *Westenholz* (1) the Court said: "We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal." In the words of Bowen L.J. in *Voinet* v. *Barrett* (2), "the stream of authority is to the effect that appearance, unless it be appearance under duress, is an election to submit to the jurisdiction from which the process has issued."

(1) (1870) L. R. 6 Q. B. 155, at p. 162.

(2) (1885) 55 L. J. (Q.B.) 39, at p. 42.

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In my opinion, an appearance not merely for the purpose of obtaining a release of property arrested, but also for the purpose of attempting to obtain a judgment freeing defendants from all liability for a collision, and for the further purpose of trying to recover a judgment upon a counter-claim—which is equivalent to a cross-action—is not an appearance "only to save property in the hands of a foreign tribunal," nor an "appearance under duress." In these proceedings the plaintiffs' vessel was not arrested to answer the counter-claim. If the plaintiffs had failed in their action, and their vessel had been found solely to blame, the defendants would have been entitled to recover the whole of their damages against the plaintiffs personally. It would be a strange inequality, in the event of the defendants failing, if the plaintiffs could only recover such part of their loss as the res might be sufficient to meet. It is true that by statute there is a possible limitation of liability in cases of collision, but, apart from the cases to which the statute applies, a sense of justice seems to demand that persons should be liable to the full extent of the damage caused by them or their servants, and that no technicality should protect them from such a liability, or should prevent persons injured from obtaining judgment for the whole of their loss and from recovering it so far as possible by due process of execution.

The law as stated in *The Dictator* (1) and *The Gemma* (2) is in consonance with this sense of justice, and I am of opinion that it is sound. The application of the defendants is accordingly dismissed with costs, and the judgment is to be drawn up in the accustomed form, condemning the defendants and their bail in the plaintiffs' damages, and in costs.

Solicitors for plaintiffs, the owners of the *Eclipse: Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Dupleix: Stokes & Stokes.*

(1) [1892] P. 304. (2) [1899] P. 285.

T. L. M.

1911
Dec. 11.

S. *v.* S. AND R.

Divorce—Practice—Pleading—Claim for Nullity in Answer to Petition for Dissolution.

A prayer for a decree of nullity on the ground of impotence may be put forward by a respondent in answer to a petition for dissolution of marriage.

Summons referred to the judge on a question raised by the registrar as to the form of pleading.

The ceremony of marriage between the petitioner and respondent was solemnized in 1902, and early in October, 1911, a petition for dissolution of marriage was presented on the ground of the adultery of the respondent with a person who was named as co-respondent.

The respondent, in her answer, denied that she was lawfully married to the petitioner; and she alleged that the petitioner was impotent and unable to consummate the marriage, and that the impotency was and continued to be incurable; and that, although she was apt and willing to receive the conjugal embraces of the petitioner, he never did consummate the marriage, and that down to and after the last attempt of the petitioner, in August, 1907, she was and continued to be a virgin. The answer further alleged conduct conducing to the adultery (if any); formally traversed the allegation of adultery; asked that the prayer of the petitioner might be rejected; and prayed for a decree of nullity.

Upon a summons by the petitioner for particulars of paragraph 1 (the denial of the legality of the marriage) and of paragraph 5 (conduct conducing to adultery), paragraph 1 was, by order of Mr. Registrar Musgrave, dated November 10, 1911, amended by adding thereto the words "as hereinafter set forth"; and, pursuant to the same order, particulars of paragraph 5 were delivered in the following terms:—"The said (petitioner) has conduced to the adultery (if any) of the respondent by reason of his ineffectual attempts to consummate, and his inability to consummate, his said pretended marriage with the respondent, as set forth in the preceding paragraphs of the said answer."

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The petitioner, in reply, denied each and every allegation contained in the answer and took issue thereon.

The respondent took out a summons for the appointment of medical inspectors to examine and report upon the parts and organs of generation of the petitioner and respondent, and the summons also called upon the petitioner "to shew cause why this cause should not be heard in camera."

This summons was heard on December 8, 1911, the petitioner, by his counsel, not opposing the appointment of medical inspectors, but objecting that the charge of adultery in the divorce petition ought not to be tried in camera.

Mr. Registrar Musgrave thereupon raised the question whether nullity could properly be claimed in answer to the petition and referred to the judge to decide whether there ought not to be a separate petition for nullity. The registrar intimated that if the pleadings, as they stood, were in order, there should be an order for the appointment of medical inspectors, and a direction that the issue as to nullity be tried first in camera.

A certificate for counsel was granted upon the summons before the registrar, who further intimated that, in conformity with the view recently expressed by the senior registrar (Dr. Pritchard) in another case (1), the registrar's certificate, that the pleadings were in order and that the case might be set down, should be withheld pending the decision of the judge.

Dec. 11. The summons, as referred to the judge, came on before Bargrave Deane J. (sitting in Court as in chambers).

Willock, for the petitioner, said that he was only instructed before the registrar to object to the hearing in camera of the charge of adultery in the petition. Apart from that, he took no objection. The point as to the form of the pleadings had been raised and referred by the registrar himself.

(1) The point as to whether there should not be a separate petition claiming nullity was raised by the senior registrar in a concurrent case (the pleadings in which were practically identical) upon those pleadings coming before him under rule 206 (Divorce Rules and Regulations). The decision of the judge on the point is now reported at the special request of the senior registrar, and by leave of the judge (the matter having come before his Lordship, sitting in Court as in chambers).

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Durley Grazebrook, for the respondent. As the registrar did not raise the point when the case was first before him, on the summons for particulars, it would have been more convenient to have left it to be raised on application for the registrar's certificate; this being, in fact, the course adopted recently by the senior registrar in a case where the pleadings were practically identical with those in the present case. As, however, the point has been referred by Mr. Registrar Musgrave, it must now be dealt with. The form of answer and prayer is taken from *Serrell* v. *Serrell and Bamford* (1), where neither the eminent counsel engaged nor the Judge Ordinary (Sir Cresswell Cresswell) questioned the propriety of the pleading; and they were well acquainted with the old ecclesiastical practice. The senior registrar seems to have had doubts as to what the old ecclesiastical practice was, and he based his refusal of the certificate, in the other case now pending, upon some words in the judgment in *Ousey* v. *Ousey and Atkinson*. (2) But in that case the Judge Ordinary (Sir James Hannen) had actually allowed the answer to be amended by adding a plea of impotence and praying for a decree of nullity on that ground. Moreover, both the parties in that case agreed in the fact that the marriage had not been consummated.

Bargrave Deane J. There is no necessity for a separate petition in such cases as this. The answer is quite correct in form. The issue as to nullity must, of course, be tried first. If the marriage is declared null and void, there can be no question of adultery. The order which the registrar made provisionally in this case will now become operative. I direct that, on application being made for the registrar's certificate that the pleadings are in order, the same shall be granted, so that the case may be set down.

Solicitor for petitioner: *H. A. Sims, Agent for Wm. Williams & Son, Cardiff.*

Solicitors for respondent: *Thos. Wm. Hall & Son.*

(1) (1862) 2 Sw. & Tr. 422; 31 L. J. (P. & M.) 55.
(2) (1874) L. R. 3 P. & M. 223.

H. D. G.

LEWIS *v.* LEWIS.
LEWIS *v.* LEWIS AND NEILLY.

1911
Dec. 14.

Divorce—Plea of Cruelty—Cross-Charge of Adultery—Evidence of Petitioner—Cross-examination—Evidence Further Amendment Act, 1869 (32 & 33 *Vict. c.* 68), *s.* 3.

Where, in a suit for a judicial separation brought by a wife on the ground of her husband's cruelty, two of the charges were that he had made false accusations of adultery against her with a man named, with whom, in the answer, he charged her with adultery, and who was now cited as co-respondent in the husband's cross-petition, and the suits had been in due course consolidated :—

Held, that the wife, after giving evidence in support of her charges of cruelty, might be cross-examined as to the allegations of adultery in her husband's answer and cross-petition, although she had not, in examination-in-chief, been asked to deny the adultery.

The wife by her petition, filed on August 30, 1910, prayed for a judicial separation on the ground of her husband's cruelty, which included the following :—

Paragraph 7 alleged, inter alia, "that the said Percy Lewis falsely accused her of being unfaithful to him and on divers occasions denied that he was the father of her unborn child."

Paragraph 8 alleged: "That a few days before the birth of her said child in January, 1910, your petitioner was falsely accused by the said Percy Lewis of committing adultery with one Neilly, and also with one Percy Hayhurst, and the said Percy Lewis at the same time violently assaulted her."

The husband by his answer, filed on October 10, 1910, denied the cruelty, and pleaded condonation, and charged his wife with adultery with the man Neilly, who was cited as co-respondent in his cross-petition.

On October 18, 1910, an order for particulars of the husband's answer was made, and this was complied with on October 31, 1910.

The husband filed a cross-petition on October 19, 1910, and prayed for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent.

Both the wife and the co-respondent by their answers, filed respectively on November 9, 1910, denied the adultery, and the

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LEWIS v. LEWIS.

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wife also alleged cruelty. On November 23, 1910, the husband in reply joined issue. In the ordinary course, the suits were consolidated, and came on for trial before Bargrave Deane J. and a common jury.

Cotes-Preedy (*Merlin* with him), for the wife.
Austin Farleigh, for the husband.
W. A. Barton, for the co-respondent.

The wife (petitioner) went into the witness-box and gave evidence in support of the allegations in her petition.

In the course of her cross-examination, counsel for the husband put a question to her as to adultery.

Cotes-Preedy objected. The wife has not been asked to deny the adultery in the witness-box, and therefore, under the Act (1), no question can be put to her tending to shew that she has been guilty of adultery.

BARGRAVE DEANE J. In my opinion the question is admissible. I do not think the Act of Parliament (1) excludes the question of adultery when the essence of the petitioner's case is that they were false charges and she has given evidence-in-chief alleging that the charges of adultery were false.

Solicitor for wife: *Cyril Renton.*
Solicitor for husband: *H. W. H. Rance.*
Solicitor for co-respondent: *Cyril Renton.*

(1) The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, is as follows: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

H. D. G.

[IN THE COURT OF APPEAL.]

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June 19, 27, 28, 30; *July* 10, 11, 12, 13; *Dec.* 1.

THE SEACOMBE.

THE DEVONSHIRE.

Admiralty—Ship—Collision—Tug and Barge in tow—Third Vessel—Tow in Collision with Third Vessel—Tug and Third Vessel to blame—Non-liability of Tow—Tow entitled to whole Damages from Third Vessel—Judicature Act, 1873, *s.* 25, *sub-s.* 9—*Preliminary Act.*

In two separate actions of damage by collision brought, in the one case, by the plaintiff owners of a barge and her master and crew, suing for the loss of their effects, and the owners of her cargo and freight, against the defendant owners of another vessel, and, in the second case, by the plaintiff owners of a barge and her master and mate, suing for the loss of their effects, against the defendant owners of another vessel, the same facts were found by the Court, namely, that a barge carrying cargo, manned by two hands, and provided with a rudder, whilst being towed in the Mersey by a tug which had the control of the navigation, came into collision with, and was sunk by, a third vessel through the joint negligence of the tug and the third vessel, the barge, in each case, though in collision with the third vessel, being free from fault:—

Held by the Court of Appeal (Fletcher Moulton and Buckley L.JJ., Vaughan Williams L.J. dissenting), that the admiralty rule as to division of loss, preserved by the Judicature Act, 1873, s. 25, sub-s. 9, only applied to the case of "collision between two ships if both ships shall be found to have been in fault," and, therefore, the cases were governed by the common law, under which one of two joint tortfeasors can be sued separately, the result being that, in each case, the defendants were liable for the whole of the loss sustained by the plaintiffs.

Per Fletcher Moulton L.J.: A statement of fact in a preliminary act is a formal admission binding the party making it, and can only be departed from by special leave.

The Seacombe.

Appeal by plaintiffs, the owners of the flat or barge *Dolly*, and her master and crew, suing for their lost effects, and the owners of her cargo and freight, in an action of damage by collision, against a decision of Bargrave Deane J. dismissing with costs the action against the defendants, the owners of the steamship *Seacombe*.

On January 9, 1911, about 8 A.M., the weather being hazy, the wind light southerly, and the tide ebb of the force of about three knots, the *Dolly*, a flat laden with about 100 tons of maize, and

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carrying two hands, was in the river Mersey, being towed by the tug *J. M. Stubbs* from the Huskisson Dock to Birkenhead at a speed of about seven knots through the water, when she came into collision—under circumstances detailed in the judgment set out below—with the ferry steamer *Seacombe*, which was proceeding from the Seacombe landing stage to the Liverpool landing stage.

By their preliminary act, dated February 8, 1911, the defendants, the owners of the *Seacombe*, with reference to No. IX. (the distance and bearing of the other vessel when first seen), answered: "About 500 yards on the port bow of the *Seacombe*"; to XII. (what measures were taken, and when, to avoid the collision) answered: "After the *Dolly* was first seen the engines of the *Seacombe* were slowed and her helm starboarded. Shortly afterwards her engines were stopped and, when the tug in charge of the *Dolly* was seen to port his helm, the port engine of the *Seacombe* was put full speed astern"; and to No. XIV. (what sound signals (if any) and when were given) answered: "None."

By their statement of claim, dated February 16, 1911, the plaintiffs alleged that "the tug was in sole control of the navigation" and that "the *Dolly* was kept in the wake of her tug, and, shortly after the *Seacombe* was seen, the tug starboarded and sounded two short blasts and the *Dolly* also starboarded. The *Seacombe* did not reply to the tug's signal, but came on under starboard helm towards the *Dolly*, and although the flatman just before the collision ordered the tow rope to be let go and put his helm hard-a-port to try, if possible, to let the *Seacombe* pass between the *Dolly* and the tug, the *Seacombe* with her stem struck the starboard bow of the *Dolly* near the stem and sank her immediately," and the plaintiffs alleged that those on board the *Seacombe* were negligent in (inter alia) "(3.) not keeping clear of the flat or taking proper measures or in due time to do so, (4.) not starboarding in due time or sufficiently, (5.) not easing stopping or reversing her engines in due time or at all, (6.) alternatively, in not keeping her course and speed, (7.) not indicating their manœuvres by sound signals, (8.) failing to comply with article 1 of the Mersey rules, and articles 21, 27, 28, and 29 of the collision regulations."

By their defence, dated March 1, 1911, the owners of the *Seacombe* alleged that the collision was "solely or jointly caused by the negligent navigation of the *Dolly* and her tug the *J. M. Stubbs*," and after stating that "the *Seacombe* was proceeding about south-east at full speed of about seven knots," by paragraph 3, alleged that "those on board the *Seacombe* observed the tug *J. M. Stubbs* with the *Dolly* in tow about two to three points on the *Seacombe's* port bow at a distance of about 500 yards. The *Seacombe* starboarded her helm, slowed her engines, and then stopped them. The tug and *Dolly*, however, instead of keeping clear of the *Seacombe*, ported their helm, whereupon the port engine of the *Seacombe* was reversed full speed, and the tug altered her course to port, and went across the *Seacombe's* bows. The *Dolly* came on under a port helm, and with her starboard bow struck the *Seacombe* on her starboard bow." By paragraph 4 the defendants alleged that "the servants of the plaintiffs on board the *Dolly* and her tug the *J. M. Stubbs* were negligent in" (inter alia) "(*c*) not keeping out of the way of the *Seacombe*, (*d*) in first porting the helm of the *J. M. Stubbs* and then starboarding across the bows of the *Seacombe*, (*e*) not easing, stopping or reversing the engines of the *J. M. Stubbs* in due time or at all, (*f*) not indicating their manœuvres by proper or any signals, (*g*) not casting off the tow rope of the *Dolly*, and in porting her helm after the *J. M. Stubbs* starboarded her helm, (*h*) failing to comply with article 1 of the Mersey rules, and articles 19, 22, 23, 27, 28, and 29 of the collision regulations." By paragraph 5 the defendants alleged that they "will contend that in law the plaintiffs are responsible for the acts of those on board the tug."

At the hearing on March 22, 1911, when the Court was assisted by two of the Elder Brethren of the Trinity House, the plaintiffs called as witnesses the master of the tug and the master of the barge. The defendants did not call any witnesses. The following judgment was delivered:—

BARGRAVE DEANE J. This case has taken a very curious course, and, if it were not that I have two eminent counsel on one side and the other in front of me, I should wonder where I was; but

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I am certain that they know their business better than I do, and they have both of them chosen to take a certain line, which I am sure is right.

This was a collision between the *Seacombe* ferry boat and the flat *Dolly*, in tow of a tug called the *J. M. Stubbs*, about mid-river, in the Mersey, at 8 o'clock in the morning of January 9, 1911, when it was, to all intents and purposes, daylight, although both vessels still had their lights up. The tug and the tow, having passed up the river on the east side as far as Princes landing stage, then started to get across the river to the Birkenhead side, and I have not the smallest doubt that, instead of cutting straight across, they, whom I will call the plaintiffs, cut across in a sort of bend, under a slight port helm, heading up-river, and gradually coming across. I do not say the plaintiffs were always under a port helm, but porting their helm, and going in the ordinary course to get across the tideway, and when they had got very nearly halfway across they saw the *Seacombe*, which had just left the Seacombe landing stage, on her way across, and they were approaching each other at a fairly broad angle. The tug describes the *Seacombe* as being about four points on her starboard side, 300 to 400 yards away. That would put them on crossing courses, and the rule (art. 19), although the tug master does not accept it, is that the vessel that has the other crossing on her starboard side shall keep out of the way, and (art. 21) that the other vessel shall keep her course and speed. That rule applies in this case, although the master of the tug will not have it; he quietly tells us that it was the duty of the *Seacombe* to keep out of his way, and he says he expected her to starboard, and she did not. He says if she had starboarded there would have been no collision. She did not starboard. He blames her for not starboarding and keeping out of the way. The plaintiffs, on the other hand, instead of keeping out of the way as the rule directs, kept on at full speed, starboarded a couple or three points, and dragged the tow right across the bows of the *Seacombe*, causing imminent risk of collision, and at the last moment, there not being time, although it was intended to let go the rope from the bow of the tow, the helm of the tow was hard-a-ported, which threw her bow on to the

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bow of the *Seacombe*. In all probability, if that had not been done, the *Seacombe* would have struck the tow somewhere amidships, with probably the same result, namely, that the tow would have sunk.

The only evidence that I have before me is the evidence from the tug and tow. Neither of those people say that anything was done except to starboard on the part of the tug, and the final porting. The tug and tow did not keep out of the way of the *Seacombe*, and did not obey the rule, therefore the plaintiffs are to blame.

I am not dealing now with the question of the tug or the tow, but the tug and tow combined are to blame for not keeping out of the way of the *Seacombe*. But, apart from that, I have to deal with the question of the *Seacombe*. I have no evidence whatever from the *Seacombe*. I have got before me a preliminary act, and I have got before me a statement of defence, and in those two documents certain statements are made. There have been cases in which this Court has been asked to deal with the case by consent on the pleadings, but that is not this case. I have got no consent to treat the pleadings as being accurate, and without that consent I cannot treat the pleadings as being anything more than certain statements put before the Court by pleaders, who have pleaded certain facts which, as we know in this Court, are often not supported by the evidence. The evidence is all one way, that the *Seacombe* did not starboard, and there is evidence from the plaintiffs' witnesses that the *Seacombe's* engines were reversing just at the time of the collision. Assuming that I act on the evidence, and do not act on the preliminary act and pleadings, the evidence is all one way, that the *Seacombe* did not starboard, but that the *Seacombe* did reverse at the last moment, but not before, and kept her course and speed until the last moment. In these circumstances, acting as I do on the evidence, and not acting on the pleadings, I am of opinion that the *Seacombe* is not to blame for this collision.

That is all I can decide. I cannot decide any question between the tug and the tow at all. If the tug were the servant of the tow, I suppose she might be responsible, but that is not a

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question which I have to decide. I only have to decide whether the *Seacombe* is responsible. The action is brought against the *Seacombe*, and I am of opinion that the plaintiffs are to blame, and, on the other hand, that the *Seacombe* is not to blame. Therefore the action will be dismissed with costs, and there will be judgment for the defendants.

On appeal:—

[By leave of the Court of Appeal, the master of the defendants' ferry boat (the *Seacombe*) was called by the appellants (plaintiffs). The effect of his evidence is stated in the judgment of Buckley L.J. (1)]

1911. June 19, 27, 28, and 30. *Laing, K.C.*, and *C. Robertson Dunlop*, for the appellants (plaintiffs), the owners of the barge *Dolly* and others.

Bateson, K.C., and *A. Hyslop Maxwell*, for the respondents (defendants), the owners of the *Seacombe*.

The arguments of counsel fully appear from the judgments.

Shortly stated, it was contended on behalf of the appellants (plaintiffs) that, admitting that the plaintiffs' tug was to blame, the defendants' ferry boat was also to blame for the wrongful manœuvres detailed in the judgment of Fletcher Moulton L.J., where also will be found the views of the Court as to the binding effect of the statements made in the defendants' preliminary act, which statements were relied upon by the appellants as establishing faulty navigation on the part of the *Seacombe*. With reference to the nature and binding effect of preliminary acts the following cases were cited:—*The Vortigern* (2); *H.M.S. Inflexible* (3); *The Sylph* (4); *The Miranda.* (5)

Secondly, that the barge *Dolly* in no way hampered her tug, but followed as a tow would do in the case of a tug having the full control of the navigation. The barge was, therefore, not to blame: see *The W. H. No.* 1 *and The Knight Errant.* (6)

(1) Post, p. 66.
(2) (1859) Swa. 518.
(3) (1856) Swa. 32.
(4) (1857) Swa. 233, at p. 234.
(5) (1881) 7 P. D. 185.
(6) [1910] P. 199; [1911] A. C. 30.

Thirdly, assuming that the tug and the ferry boat were both to blame, it was submitted that there was no admiralty rule to the contrary, preserved by the Judicature Act, 1873, s. 25, sub-s. 9, and, therefore, the plaintiffs, including the owners of cargo on board the barge *Dolly*, were entitled to recover, against either or both the two vessels in fault, namely, the *Seacombe* and the tug, the full amount, and not merely half the damage, and further, that, as the tug was not on the record, judgment should go against the *Seacombe* for the whole of the damage sustained by the barge, in accordance with the judgment of the President set out below (post, pp. 31 to 36) in the case of *The Devonshire*, where some of the cases referred to by counsel on this point are mentioned. In addition the following cases, not included in the list set out at p. 37, in the subsequent argument in the case of *The Devonshire*, were cited:—*The Ripon City* (1); *The Tasmania* (2); *The Mary Hounsell* (3); *The Snark* (4); *The Gas Float Whitton No.* 2 (5); *Boileau* v. *Rutlin* (6); *The Biola* (7); *Tildesley* v. *Harper* (8); *The Aristocrat* (9); *The Corinthian* (10); *The Minnehaha* (11); *The Ruby Queen* (12); *The Lemington* (13); *The Devonian.* (14)

Cur. adv. vult.

THE DEVONSHIRE.

Appeal by defendants, the owners of the steamship *Devonshire*, against a decision of the President (Sir Samuel Evans), in an action of damage by collision, pronouncing for the whole of the loss of the plaintiffs, the owners of the barge *Leslie* and her master and mate suing for their lost effects. (15)

On February 4, 1911, about 5 A.M., the weather being fine and clear, the wind north-easterly light, and the tide ebb of the force of about three knots, the *Leslie*, a wooden dumb barge of about

(1) [1897] P. 226.
(2) (1888) 13 P. D. 110.
(3) (1879) 4 P. D. 204.
(4) [1900] P. 105.
(5) [1897] A. C. 337, at p. 344.
(6) (1848) 2 Exch. Rep. 665.
(7) (1876) 3 Asp. M. L. C. 125.
(8) (1878) 10 Ch. D. 393.
(9) [1908] P. 9.
(10) [1909] P. 260.
(11) (1861) 15 Moo. P. C. 133.
(12) (1861) Lush. 266.
(13) (1874) 2 Asp. M. L. C. 475.
(14) [1901] P. 221.
(15) As to the suit by the owners of cargo on board the barge *Leslie*, see post, p. 68.

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eighty tons register, provided with a rudder, and manned by two hands, was in the river Mersey off Woodside, bound from Runcorn to Morpeth Dock, Birkenhead, with a cargo of Manchester goods. She was in tow of the steam tug *St. Winifred*, and was proceeding towards the Morpeth Dock, having just crossed the river from the Brunswick Dock, Liverpool, where the *St. Winifred* had left two of the three barges she was towing. The *Leslie* was following her tug, which, it was alleged in the statement of claim, "had the control and management of the navigation," and was heading down the river with a slight angle towards the Cheshire shore, making about three knots through the water, when she came into collision—under circumstances detailed in the judgment set out below—with the *Devonshire*, a screw steamship, belonging to the port of Liverpool, of 500 tons gross register, and manned by a crew of twelve hands. She was on an up-river course on the west side of the river below the Woodside ferry stage in the course of a voyage from Belfast to Manchester with a general cargo, and, with engines working full speed, was making about ten knots through the water, heading about S. magnetic.

As a result of the collision the *Leslie* sank, and her owners charged the *Devonshire* with, inter alia, failing to keep her course, and pass the *Leslie* and her tug starboard side to starboard side, with neglecting to keep clear of the *Leslie*, and neglecting to comply with arts. 21, 28, and 29 of the regulations for preventing collisions at sea, as applied by Order in Council to the river Mersey. On the other hand, the defendants, who called no witnesses, by their defence, alleged, inter alia, that the *Leslie* and the *St. Winifred*, improperly, and at an improper time, starboarded their helms, and attempted to cross ahead of the *Devonshire*, that the barge and her tug neglected to keep to their starboard side of the fairway, that the tug neglected to indicate in due and sufficient time by whistle signal the course she was taking, that the tug neglected to slacken speed or to stop or reverse her engines in due time, and, on crossing the bows of the *Devonshire*, improperly eased her speed, and neglected to slip the tow rope, that the barge neglected to cast off the tow rope, and port her helm when a collision became imminent, and that the barge and her tug neglected to comply with arts. 25, 28, and 29 of the

regulations for preventing collisions at sea, and arts. 1 and 11 of the Mersey rules.

The case came on for hearing on May 9 and 10, 1911, when the Court was assisted by two of the Elder Brethren of the Trinity House, and judgment was given in the first instance on the facts alone :—

THE PRESIDENT (SIR SAMUEL EVANS). In this action the owners of the injured barge sue the *Devonshire* for damages sustained by the barge in the collision which is described, and has been spoken to. The defendants call no evidence. It is for the plaintiffs in this case, as in every case of negligence, to establish by satisfactory evidence their rights against the parties whom they sue. Three witnesses have been called as to the navigation—I am not talking about the engineers. [The learned judge then dealt with the evidence of a man who was on the barge, and of two men who were standing on the Woodside ferry stage, and continued :] I think they (the two men on the ferry stage) were honest witnesses. It is very difficult to say they saw quite all they said they saw, because it was a very dark night, and the position was such as to make it difficult to say they saw everything, but, substantially, I accept the evidence they gave here viva voce in the witness-box. That being so, I have come to the conclusion on the evidence, looking also at the preliminary act and pleadings of the defendants, who do not call any witnesses, that this is a case of crossing vessels.

That being so, I think the tug—to whose navigation I must look in this case, because the barge, of course, was navigated by the tug—must be held to blame, because she did not observe rules 19 and 22 of the navigation rules, which are in force as statutory rules in the Mersey. Rule 19 prescribes that: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." And r. 22 is the ancillary rule: "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

The duty, therefore, of the tug, which was responsible for the

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navigation of the tow here, was to keep out of the way of the *Devonshire*, and her duty also was, if the circumstances of the case admitted, to avoid crossing ahead of the *Devonshire*. It is quite clear here that the circumstances of the case did admit it. There was a tug with some barges in tow, which had gone a little ahead of this tug, which did the right thing, and avoided crossing ahead by going under the stern of the *Devonshire*. That could have been done, and ought to have been done, by the tug in this case, and therefore, whatever the legal position is, I find that the tug is to blame for a breach of rules 19 and 22.

With regard to the *Devonshire*, her duty was to keep her course and speed. She did not keep her course, she ported more than once. Counsel for the plaintiffs held counsel for the defendants closely to the preliminary act, and said that she ported to a green light. The answer of counsel for the defendants is, "not necessarily to a green light, but probably to the three lights, the red, green, and white lights." I think that is rather too fine a point. I am advised that, if the three lights continued to be visible, and it was not a case where the green light alone came into view, shutting out the red, there was not any danger of collision at all. She might have gone on. However, I think, on the evidence, and reading fairly the preliminary act and the defence, that the green light alone was shewing at this time. As I have said, they were porting on more than one occasion, it is said to be a slight porting at first, and a further porting, I think is the way it is stated, with regard to the second manœuvre—porting further. I think she must have ported very considerably. She would not be coming down the river as close to the stages as the spot where this collision took place; that spot has been pretty accurately defined by the witnesses as being 250 or 300 feet out from the northern end of the Woodside ferry stage. She came into that position, trying, no doubt, to get past the tug and the barge. She got into that position by porting twice, according to her own story. That was, of course, not keeping her course, and, therefore, I think she is also to blame for a breach of the rule which prescribes that she ought to keep her course and speed. I also think, with regard to the *Devonshire*, that, in any case, she failed to stop, or reverse, soon

enough, under the rules of good seamanship. The decision, therefore, is, that both the tug, which was in charge of the tow, and the *Devonshire*, the defendants' vessel, are to blame for this collision.

The question of the legal liability of the defendants for the whole, or only a moiety, of the damage sustained by the plaintiffs was, after argument, reserved, and, on May 29, 1911, judgment was delivered by:—

THE PRESIDENT (SIR SAMUEL EVANS). This action is brought by the owners of the dumb barge *Leslie*, and her master and mate, against the owners of the steamship *Devonshire* for damages sustained by the barge in a collision between the barge and the steamer.

Upon the facts I found that the collision was due to the fault of the steamship, the *Devonshire*, and of the steam tug, the *St. Winifred*, which was towing the barge.

Applying the principles adopted in *The Quickstep* (1), and the cases following it, I decided that the tow was not in any way to blame, and that the plaintiffs were entitled to judgment.

The question now is, whether the plaintiffs are entitled to recover the whole of the damages against the defendants, or only a moiety. This depends upon whether, in the circumstances of this case, there was an admiralty rule, giving a moiety only, in force before the coming into operation of s. 25, sub-s. 9, of the Judicature Act, 1873: see *The Drumlanrig*. (2) If there was, only a moiety can be recovered against the defendants. The plaintiffs would, in that event, have a claim for the other moiety against the tug, apart from any special contract. If there was not, the common law rule applies, by which the plaintiffs would be entitled to recover the whole of the damages against the defendants. They would, in such a case, be entitled to recover the whole damages, either against the defendants, or against the tug which was in fault, or against both, if they framed their action for that purpose.

As between two ships, both to blame, the admiralty rule is, of course, established beyond question.

(1) (1890) 15 P. D. 196. (2) [1911] A. C. 16.

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As between innocent cargo owners in a ship to blame, and another ship also to blame, it is now settled by *The Drumlanrig* (1) that the same rule applies.

How far does the rule extend? Is the rule in a case of innocent sufferers confined to cargo owners, whose cargo is in one of the negligent vessels; or does it extend to cases of innocent owners of craft, or of cargoes not being, or in, a vessel in fault?

Does the case of *The Drumlanrig* (1) define, and comprehend, the rule, or is it only an instance of the application of the rule?

Various opinions have been held and expressed as to whether the admiralty rule or the common law rule is the more conformable in the average case to fairness and justice.

I think, upon the whole, that in admiralty cases the division of the damages recoverable into moieties, where an innocent person suffers from the negligence of those in charge of two other ships at fault, is fairer and more conducive to cautious navigation.

Where the Act of Parliament speaks of "rules hitherto in force in the Court of Admiralty," I should be glad to find a rule applicable, on some general principle, to various instances of innocent owners suffering loss by collisions, and not to have the "rule" confined to what would appear to be only an instance or illustration of a rule, as in the case of an innocent owner of cargo laden on one of the ships at fault. Lord Esher in *The Bernina* (2), in the Court of Appeal, in referring to *The Milan* (3) does use terms of general import, when he says that the decision by Dr. Lushington in *The Milan* (3) proceeded upon the ground that "It had always been the practice there (in the Admiralty Court), instead of saying that an innocent plaintiff might recover his whole loss against any one wrong-doer, to say that he must recover part from one, and part from the others, and, if there are only two, half from each." But he immediately adds: "He (Dr. Lushington) said, in terms, that the plaintiff must sue the owners of the ship, in which his cargo was, for the other half." I see no logical distinction between the cases of an innocent owner of cargo in a ship at fault, and an innocent owner of a dumb barge

(1) [1911] A. C. 16. (2) (1887) 12 P. D. 58, at p. 76.
(3) (1861) Lush. 388.

attached to a tug at fault, or why in the one case only a moiety of the loss sustained can be recovered against a vessel to blame, in the other the whole.

But in our jurisprudence we cannot always find logic; and indeed for the particular rule of "'Moieties,' if both to blame," in the special system of jurisprudence prevailing in the Admiralty Court, no logical basis can be stated.

I must therefore inquire whether there was in fact, before the Judicature Act, 1873, any rule adopted in practice which would justify me in saying that the innocent owners of the dumb barge in this case are restricted to a moiety of the damage sustained in an action brought by them against only one of the ships whose negligence jointly produced the collision.

The somewhat strict application of the doctrine of identification between tug and tow, which obtained in years gone by, might account for the absence of instances exactly like the present case. The eminently sensible doctrine which was adopted in *The Quickstep* (1) from the decision of the Supreme Court of the United States of America in *Sturgis* v. *Boyer* (2), although its adoption had been foreshadowed by Sir James Hannen in *The Stormcock* (3), was not applied until 1890.

Until then, in most cases, and for almost all purposes, a tug and tow were considered as one vessel. That being so, it is not a matter of surprise that examples of innocent owners of tows attached to guilty owners of tugs are wanting.

I have, therefore, to inquire how other innocent owners of craft, apart from innocent owners of cargo in negligent vessels, as in *The Milan* (4), were treated in the Admiralty Court.

I have been unable to find a single case of an innocent sufferer by a collision at sea (other than the aforesaid cargo owner) who was restricted to the recovery of a moiety of his loss.

In the Supreme Court of the United States of America ("whose decisions," as Lord Herschell has said, "on account of its high character for learning and ability are always to be regarded with respect"), in an action brought by a vessel at anchor against a tug and tow claiming damages for a collision between the vessel

(1) 15 P. D. 196.
(2) (1860) 24 How. 110.
(3) (1885) 5 Asp. M. L. C. 470.
(4) Lush. 388.

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at anchor and the tow, it was found that the vessel at anchor and the tug were both to blame, and that the tow was not; and it was held that the tow was not liable, but that the loss was to be equally divided between the vessel at anchor and the tug: *The James Gray and John Fraser.* (1) In that case the tow was defendant, and succeeded. It does not aid in shewing whether as plaintiff, if damaged, she could recover all or half. In America also, in *The Sterling and Equator* (2) and in *The City of Hartford* (3), it was held that in actions by innocent owners of the tow and of her cargo against a third vessel and the tug, both in fault, the decree should be against each for a moiety of the damage, the right being reserved to collect the entire amount from either in case of the inability of the other to answer for her portion.

Sir Charles Butt refused to apply these cases in England. In *The Stormcock* (4), to which I have already referred, a tug and tow, both to blame, collided with an innocent vessel. The plaintiffs, owners of the latter (having obtained by an agreement a provisional payment of some of the damage from the tow, which accepted responsibility for the tug), brought an action against the tug alone. The plaintiffs were held entitled to recover all the damages occasioned by the collision from the defendant tug. In *The Niobe* (5) the plaintiffs' steamer collided with a tug, by reason of the negligence of the tug and her tow. The case is reported as between the plaintiffs and the owners of the tow. I have looked up the files and records, and I find that the owners of the tug admitted liability, and that, after the finding against the tow, the plaintiffs recovered judgment for full damages against both the tug and the tow.

In *The Avon and Thomas Joliffe* (6), an action was brought by an innocent vessel against a tug and tow, both found to blame. The decree condemned the owners of both in the full damages. The Court was afterwards moved to amend the decree by making each set of owners liable severally only for half the damages. Sir Charles Butt refused to adopt

(1) (1858) 21 How. 184.
(2) (1882) 106 U. S. 647.
(3) (1877) 97 U. S. 323.
(4) 5 Asp. M. L. C. 470.
(5) (1888) 13 P. D. 55.
(6) [1891] P. 7.

the decisions in the American cases of *The Sterling and Equator* (1) and *The City of Hartford* (2) (above referred to), and declined to alter the decree, or to apply the admiralty rule "as to the apportionment of damages, where both vessels, that of the plaintiffs and of the defendants, are to blame."

In *The Englishman and The Australia* (3), the plaintiffs' steamer collided with the defendants' tug, and the plaintiffs' vessel, and the tug and tow (both defendants), were all found to blame. The President (Sir F. H. Jeune), in adjusting the cross-claims, was asked to draw up the judgment so as to make the tug and tow primarily liable for a moiety only of the sum recoverable against them, with a remedy over against each in default of the other, but he declined to do so, saying that the point was concluded by the judgment in *The Avon and Thomas Joliffe*. (4)

In *The Morgengry and The Blackcock* (5), the plaintiffs' vessel and the defendants' tug and tow were all held to blame. Judgment was signed by default against the tow for the whole of the damage. The tow was sold, and the proceeds were brought into Court. It was held that the plaintiffs were entitled to the proceeds in Court in part satisfaction of the whole of their damage under the decree by default against the tow, and were also entitled to a moiety of their damage as against the tug under the decree of both to blame. That is not a decision in point, but it is an instance where, apparently, it was admitted that one of two vessels to blame was liable for the whole loss.

In the foregoing cases it will be observed that the third vessel was not connected with another as a tug with a tow.

In the last case to which I shall refer, namely, *The Harvest Home* (6), a pilot cutter, held in the Court of first instance to be innocent, was lashed alongside the tow, on which the pilot was. It was a complicated case. The action was brought by

(1) 106 U. S. 647.
(2) 97 U. S. 323.
(3) [1894] P. 239.
(4) [1891] P. 7.
(5) [1900] P. 1.
(6) [1904] P. 409; (C. A.) [1905] P. 177.

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the owners of the pilot cutter against the owners of a vessel held to be innocent of blame, and against the owners of two tugs found to blame, both of which belonged to the same owners. The owners of the innocent vessel counterclaimed against the owners of the pilot cutter and the owners of the tugs. It was held in the Court of first instance that the pilot cutter, and the innocent vessel, were entitled to succeed against the tugs. In the Court of Appeal, on the appeal of the owners of the tugs, it was held that the pilot cutter was also to blame; and accordingly the liability of the owners of the tugs was reduced to a moiety of the claim of the pilot cutter. It appears that although the tow to which the pilot cutter was lashed was not sued, she was admitted or decided to be guilty of blame. In the Court of first instance, therefore, although the pilot cutter was lashed to a guilty tow, she recovered her full damages against the owners of the two guilty tugs, and her claim was only reduced in the Court of Appeal to a moiety because she was also found to blame.

In reviewing the authorities, I have come to the conclusion that it cannot be said that there was, before the Judicature Act, 1873, or that there has been since, an admiralty rule in force which would entitle the defendants to say that the plaintiffs could only recover a moiety of the damage they suffered by the collision. If this is so, *The Drumlanrig* (1) prevents my saying that the plaintiffs are only entitled to a moiety.

I refrain from saying anything as to whether it follows that the common law doctrine of no contribution between tortfeasors applies, or whether the defendants would be entitled, on the principle adopted in *The Frankland* (2), or otherwise, to any claim over against the owners of the tug. That question may be raised in a case which I understand is now pending.

In the present action I have come to the conclusion that the plaintiffs are entitled to judgment, as against the defendants, for the whole of their loss; and I decree accordingly, and order the usual reference to the registrar and merchants. The plaintiffs are also entitled to their costs.

(1) [1911] A. C. 16. (2) [1901] P. 161.

On appeal:—

1911. July 10, 11, 12, 13. *Leslie Scott*, K.C., and *Dawson Miller*, for the appellants (defendants), the owners of the steamship *Devonshire*.

Bailhache, K.C., and *D. Stephens*, for the respondents (plaintiffs), the owners of the barge *Leslie*, and her master and mate suing for their lost effects.

The arguments of counsel fully appear from the judgments. The two main contentions of the appellants (defendants) are set out and dealt with at length in the judgment of Fletcher Moulton L.J., namely, (1.) that the negligence of the tug was constructive negligence on the part of the tow, and, therefore, the tow was to blame; (2.) that the admiralty rule as to division of loss applied, and, therefore, the respondents (plaintiffs), the owners of the tow and others, could only recover half the damage they had sustained.

In addition to the cases cited by counsel in the case of *The Seacombe* (ante, pp. 26, 27), those referred to by the President in his judgment in *The Devonshire* (ante, pp. 31 to 36), and those dealt with in the following judgments, counsel for the appellants (defendants) cited: *The Cleadon* (1); *The Fanny M. Carvill* (2); *The Duke of Buccleuch* (3); *The Khedive* (4); *The Malvina* (5); *The Vera Cruz* (6); *The Annapolis* (7); *The Maria* (8); *Tuff* v. *Warman* (9); *The Energy* (10); *The Petersfield and The Judith Randolph* (11); *The Aurora and Robert Ingham*. (12) Counsel for the respondents (plaintiffs) cited: *The Castlegate* (13); *The Sylph* (14); *The Beryl*. (15)

Cur. adv. vult.

Dec. 1. VAUGHAN WILLIAMS L.J. We have been considering two cases, *The Seacombe* and *The Devonshire*, which raise

(1) (1860) 14 Moo. P. C. 92.
(2) (1875) 13 App. Cas. 455, n.
(3) [1891] A. C. 310.
(4) (1882) 7 App. Cas. 795.
(5) (1863) Br. & L. 57.
(6) (1884) 9 P. D. 88, 96.
(7) (1861) Lush. 295, 355.
(8) (1839) 1 W. Rob. 95.
(9) (1858) 5 C. B. (N.S.) 573.
(10) (1870) L. R. 3 A. & E. 48.
(11) (1789) cited in *Hay* v. *Le Neve*, 2 Shaw's Scotch Appeals, 395, at p. 403.
(12) (1861) Lush. 327.
(13) [1893] A. C. 38, at p. 52.
(14) (1867) L. R. 2 A. & E. 24.
(15) (1884) 9 P. D. 137.

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somewhat similar and difficult questions as to the survival and area of the application of the rule of admiralty jurisprudence which divides the loss arising from collision of ships at sea.

It is, I think, beyond controversy that this rule applies as between two ships both to blame, and it has now been decided by the House of Lords in *The Drumlanrig* (1) that, as between innocent cargo owners in a ship to blame, which has come in collision with another ship to blame, the same rule applies. This is the doctrine of *The Milan* (2), decided by Dr. Lushington in 1861. The subjection of the cargo owner to this rule of admiralty jurisprudence has nothing to do with any negligence of the cargo owner or any relation of master and servant existing between him and the master of the ship carrying his goods. It is a doctrine which flows largely from the Court of Admiralty having always treated the ship as a res or subject-matter on which a ship injured by a collision at sea has a lien for the satisfaction of the loss or damage arising from the collision. The frequent epithet of "innocent" applied to the cargo owner shows that innocence and blame have nothing to do with the application of the admiralty rule of division to cargo owners to whom neither of the colliding ships belongs. Admiralty jurisprudence holds that those whose goods have been injured by the collision of ships at sea can only recover damages for loss on the same basis that rules recovery for loss by collision of ships at sea between the ships themselves.

Originally, as between the colliding ships at sea, those who administered marine law throughout the world tried to apportion liability for loss to quantum of blame. After a time the High Court of Admiralty in England, and many other Courts administering marine jurisdiction in various parts of the world, substituted, in consequence of the difficulty of ascertaining with anything like precision the quantum and therefore the just apportionment of blame, equal division—the judicium rusticorum, as it has been called—for precise apportionment. This admiralty rule has, of course, always been in conflict with the common law of England. The ships to blame were in a sense joint tortfeasors—at common law, of course, an individual, being one of several joint

(1) [1911] A. C. 16. (2) Lush. 388.

tortfeasors, might be sued alone and compelled by execution to pay the damages compensating for the whole loss; nay, more, if all were sued and judgment obtained against all, execution might go against one and the whole of the damages obtained from him, and in no case would there be any contribution amongst tortfeasors obtainable by action at law.

I have neither obligation nor right to discuss which of these conflicting systems of law—the common law and the admiralty law—is the more just. Perhaps the one may be more just on land and the other at sea. I have only to consider what portion of admiralty jurisprudence has survived the Judicature Act, 1873, of which Act s. 25, sub-s. 9, provides that:

"In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail."

This sub-section was much discussed in the House of Lords in what is called *The Drumlanrig Case*. (1) The discussion in that case, so far as it affects the case now before us, related mainly to the question whether the effect of the Judicature Act, 1873, s. 25, sub-s. 9, is to stereotype all the admiralty rules which were in force in 1873, where they varied from the common law rule, even if it should afterwards appear that they ought not to have been in force, and it was held in the House of Lords that the opposite construction would ignore altogether the words of the Act "hitherto in force," and the House refused to do this. The judgments in *The Drumlanrig* (1) do not seem to me to decide definitely what is the meaning of the words in the section "rules hitherto in force," although the question of the meaning of these words was more or less touched upon in the respective judgments of the noble Lords. There is no suggestion that the words "rules in force" mean rules published or formally adopted by the Court, and I think that the question is left open whether the area included in the words "rules hitherto in force" is limited or defined by the particular cases determined hitherto from time to time before the Judicature Act, 1873, or whether such cases

(1) [1911] A. C. 16.

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are to be regarded as instances of a rule, or I would rather say "principle of jurisprudence," upon which such cases have been decided. Lord Halsbury, in his speech, says: "The real truth is that the Court of Admiralty—that is to say, the Court of the Lord High Admiral—administered a different system of jurisprudence, and it is not apt language to speak of an alteration of the law as a rule of Court; but I have come to the conclusion that what the Legislature meant was that there should be from henceforth a change in the law, if there was any difference." Again he says: "There is no doubt that the difference of administration of the Lord High Admiral by this Court was not a question simply of practice such as would be appropriately described as a rule of Court, but it was a different system of jurisprudence . . . . administered differently from the law of England." And again he says later, after tracing the cosmopolitan rise of the system of jurisprudence administered in the Court of Admiralty, without reference to what was the true view of the law, "I agree that it is only the jurisdiction of the Court to lay down what is the existing law, and not to attempt to alter or even improve it," and concludes his judgment by saying that "the Legislature says that what was constantly called (whether rightly or wrongly) the rule of the Admiralty Court as laid down is that which we are now to accept as the law; and, although I feel very strongly the effect of the argument of counsel for the appellants on the subject, I think that these words ('hitherto in force') estop me from going further than this, to ascertain if I can what was the rule of the Court of Admiralty, and if I can ascertain it I am to apply it in such a case as this."

These quotations throw some light on the question which the President puts to himself in his judgment in *The Devonshire*, the case which we are considering together with *The Seacombe*. "Does the case of *The Drumlanrig* (1) define, and comprehend, the rule, or is it only an instance of the application of the rule?" The House of Lords in *The Drumlanrig* (1), in my opinion, were not, by their decision, defining or comprehending the rule which they held was in force in 1873, but were merely deciding that, according to a practice in force at that date, the admiralty rule—

(1) [1911] A. C. 16.

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under which a plaintiff is only entitled to recover a moiety of the damages sustained by him from a collision of two ships both to blame—extended to a case of an innocent cargo-owner plaintiff, whose goods were "cargo" on board one of the colliding ships. The House of Lords did not decide that the admiralty rule substituting division for apportionment only applied in cases where the ships to blame for the collision were the two colliding ships. I do not think that the House of Lords intended by their decision to exclude, from the operation of sub-s. 9, every rule of admiralty jurisprudence excepting so far as it had, prior to 1873, been applied in particular or specific cases. New cases, as time progresses, must raise the question of the application of the respective admiralty rules regarding apportionment of liability between tortfeasors in navigation, unless, indeed, such apportionment is in future to be superseded by the common law rule.

Thus far I have dealt only with the question of the survival, after the passing of the Judicature Act, 1873, of the rules or principles of admiralty jurisprudence, but both the cases with which we have to deal raise questions as to the respective liabilities or responsibilities of tug and tow where there has been a collision with a third ship, and raise the question of the identity of the tug and tow, that is to say, whether for the purposes of navigation tug and tow are to be regarded as one vessel. Of course, if they are to be so regarded, there is in the case of a collision between the composite vessel, constituted by tug and tow, and another vessel, a collision between two vessels, the composite vessel and the independent vessel, but if the tug and tow are to be regarded as separate vessels, to the extent that one may be to blame and the other not, according as one has the control of the navigation, there will be three vessels and not two, and it will follow that a vessel, be it tug or tow, which has not the control of the navigation, may, in a case of collision with an independent ship to blame, sue such independent ship; but we have to consider whether the tow, in a case where the collision results from the bad navigation respectively of the tug and the third vessel, can recover the whole damage, or whether it can only recover half from each of the tortfeasors according to the admiralty rule.

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This question of identity of tug and tow is of vital importance in the cases we have to consider. In *The Seacombe*, the composite vessel—constituted by the tug *J. M. Stubbs* and the tow *Dolly*—on the one hand, and the *Seacombe* on the other hand, were each to blame, and in *The Devonshire* the composite vessel—constituted by the tug *St. Winifred* and the tow *Leslie*—on the one hand, and the *Devonshire* on the other hand, were each to blame, and the admiralty rule of division beyond question will apply; but if there is no identification of tug and tow, either on the ground that safety of navigation requires that tug and tow should be under one command—as Dr. Lushington used to hold—or on the ground that the tow is the master whom the tug has to obey, then one has to deal with three ships: (1.) the tug, (2.) the tow, (3.) the independent ship, and the main question in the present case is whether the admiralty rule of division applies.

In both cases the statement of claim alleges the navigation of the tug and the tow to be in the sole control and management of the respective tugs. In the case of *The Devonshire* the President finds in terms that it is to the navigation of the tug that he must look in that case, because the barge *Leslie* was navigated by the tug *St. Winifred*. In the case of *The Seacombe* Bargrave Deane J. made no express finding as to the control of the navigation, because, as he did not find the *Seacombe* to blame, the question whether the tug or the tow had the control of the navigation became immaterial. I am of opinion that in both cases the respective tugs had the control of the navigation.

I do not propose to deal with the question raised by the President as to whether the admiralty rule or the common law rule is the more conformable in the average case to fairness and justice, seeing that, in my opinion, we have no obligation or right to raise any such question.

As to the doctrine of identification between tug and tow, the President says that until 1890, in most cases and for almost all purposes, a tug and a tow were considered one vessel. In 1890 Sir James Hannen and Butt J., in the case of *The Quickstep* (1), decided that the question whether a tow is liable for the negligence

(1) 15 P. D. 196.

of the tug which causes a collision is a question of fact in each case, and depends upon whether, in the circumstances, those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owners of the tow. It does not seem to me that this decision is consistent with the admiralty cases decided prior to 1873, nor do I think that the decision of Dr. Lushington in *The Milan* (1), whereby he decided that the admiralty rule of division applied to an innocent owner of cargo carried in one of two ships to blame for a collision, was in any way based on negligence or blame of the cargo owner, but on the refusal in admiralty jurisprudence to adopt the common law rule.

This being my opinion, I shall ask myself in each of these cases of *The Seacombe* and *The Devonshire* the question whether the circumstances bring the case within the principle upon which Dr. Lushington, in the case of *The Milan* (1), or the Court of Admiralty, in any other case prior to the Judicature Act, 1873, held that the innocent cargo owner could only recover from each of the ships to blame for the collision half the damage his cargo sustained. I do not think that the cargo case was decided upon the ground of identification of the cargo with the ship. In fact, Dr. Lushington, when criticizing the judgment in *Thorogood* v. *Bryan* (2), distinctly repudiates the doctrine of identification of cargo with the carrying ship. So I doubt, in these two cases which we have to decide, the conclusiveness of the case of *The Quick-step* (3) and other cases turning upon the identity of tug and tow on this question of division of loss. The basis of the admiralty rule of division, as I have already said, is, in my opinion, the right of arrest, the right in rem, by which the cargo owner can only get a remedy in the Court of Admiralty compatible with the rights, remedies, and liabilities of the two colliding ships inter se.

I am uncertain on the authorities whether the lien for damages caused by collision, or the arrest of the ship, extends to the loss of or damage to the cargo. If it does, this would itself be a ground for restricting the claim on behalf of the owner of cargo

(1) Lush. 388. (2) (1849) 8 C. B. 115.
(3) 15 P. D. 196.

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damaged in a collision to the recovery against each of the ships to blame and their owners of one half only of the damage. Be this how it may, there can be no doubt but that in the case of damage caused by collision at sea the Court of Admiralty does not recognize the common law principle that each tortfeasor is liable to be sued for the whole of the damage caused by the joint tort. It was because those who had to administer maritime law did not recognize the justice of the common law principle when applied to damage arising from collisions of ships at sea that they in the early days of administration of maritime law adopted the principle of apportionment of liability in proportion to the quantum of blame in cases where two ships were to blame. Then the difficulty, in the case of ships colliding at sea, of apportioning with any precision the blame led to the admiralty rule of division. The application of the rule in cases where the blame lies with two colliding ships, and the application of it to cargo on board one of the two colliding ships to blame, although no blame or responsibility can be attached to the cargo owner, is, of course, well established, and what we have to determine is: Does this rule of division, based on the consideration which I have set forth, apply to a case where only one of the two ships to blame is in collision with a third ship not to blame? The principle of apportionment of blame, whether carried out by precise apportionment or by judicium rusticorum, seems of the essence of maritime law. The difficulty of precise apportionment of blame in the case of collision at sea is the foundation of the admiralty rule of division.

What the Court has to decide on these appeals is: whether this rule applies to a case where one of the two ships to blame and a third ship come into collision—that is, in *The Seacombe* case, where the flat *Dolly* comes into collision through the faults of the tug *J. M. Stubbs* and the *Seacombe*, and in *The Devonshire* case, where the barge *Leslie* comes into collision through the faults of the tug *St. Winifred* and the *Devonshire*.

I have come firmly to the conclusion that the principles of law, based on the considerations to which I have referred, logically extend to the case in which the damage complained of results from the collision of a ship to blame and an innocent

ship caused by the negligence of two ships, one of which is not a colliding ship, but which renders both liable to be sued by the innocent ship in collision, as both, by the negligent navigation of their respective ships, contributed to the accident.

Every principle of law which leads to and justifies the division of the damages between two colliding ships "to blame" applies, in my opinion, to the case of two ships to blame for the collision, one of which only is a colliding ship. I cannot believe that the Admiralty Court, which, in the case of damage caused by the collision of two ships, refused to recognize the common law rule making each tortfeasor liable for the whole of the damage without any right of contribution from the other tortfeasor, would have recognized the selfsame common law rule in a case in which one of the tortfeasors was not a colliding ship, but only one of the two ships whose negligence caused the collision.

Apart from any difficulty arising from the construction of s. 25, sub-s. 9, of the Judicature Act, 1873, I should certainly come to the conclusion that the innocent ships injured in the respective collisions could not recover from one of the ships to blame the whole damage, but only half. I have already expressed my opinion, not without doubt, that this section saves or preserves admiralty practice and rules as flowing from the principles of admiralty jurisprudence, and not merely as applied in particular cases.

With regard to the construction of sub-s. 9 of s. 25 of the Judicature Act, 1873, the decisions in *The Quickstep* (1) and other cases subsequent to 1873, rejecting the decisions of Dr. Lushington treating, at all events prima facie, the tug as the agent or servant of the tow, and identifying, for almost all purposes, the tug and the tow as one vessel, throw some light on the construction of this sub-section, for it is clear, as pointed out by the President in his judgment in *The Devonshire*, that "until then, in most cases, and for almost all purposes, a tug and tow were considered as one vessel," and "that being so, it is not a matter of surprise that examples of innocent owners

(1) 15 P. D. 196.

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of tows attached to guilty owners of tugs are wanting." Dr. Lushington treated the tug as the agent or servant of the tow, and did so on the ground that the tug and the tow ought to be considered as one vessel ; but the fact that there are admiralty decisions to the effect that the tug and the tow are not so identified with one another that the tow cannot recover against the tug that which the tow has been obliged to pay as compensation for the negligence committed by the tug (see per Sir James Hannen in *The Stormcock* (1)) made Sir James Hannen doubt Dr. Lushington's decisions on this point, and made Sir James Hannen and Butt J. arrive in *The Quickstep* (2) at the conclusion that " whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case." This conclusion, in my opinion, could only have been justified in 1890 upon the basis that the words " rules hitherto in force " mean not rules affirmed in particular cases, but the rules to be inferred from the principles adopted in admiralty jurisprudence on an examination of all the previous decisions.

I will now try and apply the conclusions of law at which I have arrived to the facts of the two cases before the Court. First, then, I will take the case of *The Seacombe*. In that case Bargrave Deane J. found for the defendants on the ground that there was no evidence that the *Seacombe* was to blame. We have had before us an additional witness, and I am of opinion that the ferry steamer *Seacombe* was also to blame for the collision between it and the *Dolly* (the tow). Bargrave Deane J. also found that the tug *J. M. Stubbs* and the tow (the *Dolly*) combined were to blame for not keeping out of the way of the *Seacombe*. I think this is wrong. There is no evidence shewing that the tow (*Dolly*) was to blame. The learned judge only found the *Dolly* to blame because of her combination with the tug *J. M. Stubbs*, which clearly was to blame. This decision conflicts with *The Quickstep* (2), which decides that the question whether a tow is liable for the negligence of the tug which causes a collision is a question of fact in each case, and depends upon whether, in the circumstances,

(1) 5 Asp. M. L. C. 470. (2) 15 P. D. 196.

those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owners of the tow. But, on the other hand, the decision in *The Quickstep* (1) is hard to reconcile with the numerous cases decided before the passing of the Judicature Act, 1873, which cases, as the President, Sir Samuel Evans, points out in his judgment in *The Devonshire*, shew that the Court of Admiralty, until *The Quickstep* (1), in most cases and for almost all purposes considered the tug and the tow as one vessel, and suggested that the somewhat strict application of this doctrine may account for the absence of instances raising the point which is raised before us both in *The Seacombe* and *The Devonshire*. I think that we ought to act upon the decision in *The Quickstep* (1), not as a new rule since the Judicature Act, 1873, nor as a rule to be found in the decision of any prior reported case, but because the judgment in *The Quickstep* (1) is justified by consideration of the principles of the decisions prior to 1873, which, as pointed out by Sir James Hannen in *The Stormcock* (2), negative the universality of the identity of the tug and tow asserted in the prior decisions in the Court of Admiralty.

Having arrived at this conclusion, the only question I have to deal with is the quantum recoverable, and, for reasons which I have already given, I think that in the case (the *Seacombe*) of a collision between one of two ships both to blame for the collision and a third vessel in collision, but not to blame, the admiralty rule as to division of damages applies, and the plaintiffs, the owners of the innocent vessel, can only recover half the damages from each tortfeasor. Secondly, I will take the case of the *Devonshire*, which collided with the barge *Leslie*, which was not to blame, but collided through the combined negligence of the tug *St. Winifred* and the *Devonshire*. The only point to be decided is the same point which I have already dealt with in *The Seacombe*. The result is, in my opinion, that in each case the admiralty rule of division applies, and the plaintiffs can only recover half the damages from each tortfeasor.

I want to add a statement, that I think it is of the utmost importance, having regard to the international character of

(1) 15 P. D. 196. (2) 5 Asp. M. L. C. 470.

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admiralty law, that nothing should be done to so alter the admiralty law as to make it a part of the common law and not a part of a separate system of judicature in which all the nations of the world are interested. It is true that the half-and-half rule is not adopted by all nations, but the principle is accepted that the liability must be divided between the wrong-doing ships, though by apportionment as distinguished from the judicium rusticorum; but precise apportionment and apportionment in the rougher English method are equally inconsistent with the common law rule negativing contribution between joint tortfeasors.

FLETCHER MOULTON L.J. This is my judgment in *The Devonshire*.

The *Leslie* was a dumb barge adapted solely for being towed. At the time of the accident it was being towed by the tug *St. Winifred* down the river Mersey. The *Devonshire* was a steamer proceeding up the Mersey, and a collision took place between the *Devonshire* and the *Leslie*. The Court below has held both the steamship *Devonshire* and the *St. Winifred* to blame, and this decision is not appealed against. The negligence of which the steamship *Devonshire* and the *St. Winifred* have been found guilty consisted in the steamship *Devonshire* not keeping her course and speed and the *St. Winifred* not giving way. The persons managing the *Leslie* were not guilty of any negligence. The control of the navigation was necessarily in the tug entirely, and nothing that those on board the *Leslie* could have done would, under the circumstances, have affected the collision. In a considered judgment the President, who tried the case, has declared the plaintiffs—namely, the owners of the barge *Leslie*—and her master and mate, suing for the loss of their effects, entitled to recover from the defendants—namely, the owners of the steamship *Devonshire*—the whole of their loss. It is from this judgment that the present appeal is brought.

The appellants put forward two contentions: (1.) That the negligence of the tug is constructive negligence on the part of the tow, at all events in cases where the tug has been found

guilty of a breach of the statutory regulations. (2.) That even if the tow is entitled to sue as an innocent vessel, the rules of law that prevail in the Court of Admiralty require that the blame of the collision should be apportioned equally between the tug and the colliding vessel; the tow, therefore, can recover only one half of the loss from the latter.

In support of the first contention the appellants rightly pointed out that it has long been laid down in the Admiralty Court that for many purposes the tug and the tow must be regarded as one vessel. It is evident that this must be the case in deciding what is the duty incumbent on the tow and tug with regard to the other vessel, as, for instance, the course that they should steer. Inasmuch as they are physically connected, it would be impossible to allow such a matter to be independently decided for each vessel, lest the result should not be the same for both. In all such matters, therefore, what the tug does the tow must also do; but neither the reason upon which such a principle is based nor the decisions in which it has been applied go so far as to say that for all purposes the tow and the tug must be identified, so that the blameworthy conduct of the one must be treated as bringing blame on the other.

In considering this question it is necessary to bear in mind that the relations between the tow and the tug vary in different cases. In the case of seagoing ships that are in tow the whole direction is, as a rule, in the hands of the persons navigating the tow, and the tug and her crew are for navigating purposes in the position of their servants. In such a case the tow is clearly responsible for herself and the tug; but an equally well known operation is the towing of barges or other craft of like kind, either singly or in groups. In such cases the tow has no control over those navigating the tug. The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the

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general principles of our common law, and I should decline to do so unless I found a well-settled principle of admiralty jurisprudence evidenced by a course of consistent decisions which required me to do so. When the decisions are examined, the contrary is found to be the case. In the year 1874 the case of *The American and The Syria, Union Steamship Co.* v. *The Aracan* (1) came before the Privy Council on appeal from the Court of Admiralty in England. The plaintiffs were the owners of two steamships, the *Syria* and the *American*. On calling at Ascension the master of the *American* found the *Syria* lying there disabled, and proceeded to tow her home. On the voyage a collision occurred between the *Aracan* and the *Syria* by reason of the negligence of the *American*. In the Admiralty Court the judge held that the *Syria* was not to blame for the collision, but that she and the *American* were by intendment of law one ship, and therefore he gave judgment against her. Their Lordships reversed this decision and held that, inasmuch as the governing power was wholly in the *American*, the *Syria* could not be deemed in intendment of law one vessel with the *American*, or liable for negligence. In 1890 the Court of Admiralty (Sir J. Hannen and Butt J.) applied the same law in the case of *The Quickstep* (2), holding that, where a barge is in tow, and the governing power is wholly in the tug, the tow is not liable for the negligence of the tug. Finally, in 1910, the House of Lords, in the case of *Owners of the Lightship Comet* v. *Owners of the Hopper Barge W. H. No.* 1 (3), held a barge not to blame where it was in tow, although the tug was held to blame, a decision utterly inconsistent with the contention that, under such circumstances, a tow and its tug are by intendment of law one vessel for all purposes of legal liability. Other cases of a like kind are *The Mary* (4) and *The Millwall.* (5) Lord Watson's remarks in the case of *The Niobe* (6) fully sum up the law on this point.

The appellants sought to establish that this rule does not apply

(1) (1874) L. R. 6 P. C. 127.
(2) 15 P. D. 196.
(3) [1910] P. 199; affirmed [1911] A. C. 30.
(4) (1879) 5 P. D. 14.
(5) [1905] P. 155.
(6) [1891] A. C. 401, at p. 407.

where the fault of the tug is a breach of the sailing regulations. I wholly fail to appreciate the contention. The grounds on which the Courts have held that in such circumstances the tow and the tug are not, in intendment of law, one vessel do not depend on the nature of the misconduct of the tug or its relation to the sailing regulations. Indeed, in the case of *The American and The Syria* (1) the negligence was actually a breach of those regulations; but, apart from this, I am of opinion that the object and effect of the sailing regulations is to fix duties and not to apportion legal liabilities. It is absurd, therefore, to say that a barge, which ex concessis has done all that it ought to do, is by reason of the sailing regulations made legally liable for the negligence of a tug that has not. Towing is a lawful and well recognized operation, and is even referred to in the regulations, and I can see nothing whatever in them which bears in any way on the question whether, where the governing power is wholly in the tug, there should be an intendment of blame in the tow where those on board her have performed all their sailing duties. I am, therefore, of opinion that the first contention of the appellants wholly fails.

The second contention raises a point of great legal importance. It is put very broadly by the appellants. They contend that it is a principle of admiralty law that if there is a collision due to the concurrent negligence of two ships, then for all purposes, whether affecting the delinquent ships themselves or outsiders, each ship has to bear only half the blame and has to pay only half the damages.

Before examining the argument by which it is sought to support this legal proposition, there are certain general considerations which will tend to throw light on the question under discussion. In the first place such a principle as that contended for could only have arisen in the Admiralty Court. No such principle as to apportioning liability is to be found in our common law. If, therefore, it exists at all, it exists in that court only, unless by statute it has been made to obtain in courts of common law also. In the next place the alleged principle does not come within the provisions of s. 25, sub-s. 9, of the Judicature

(1) L. R. 6 P. C. 127.

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Act, 1873, by which the admiralty rule laid down and acted on in the well-known case of *The Milan* (1) was preserved and made of general application in all the Courts. The sub-section reads as follows: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail." The collision in this case was between the *Leslie* and the *Devonshire*, and both those ships were not held to blame—the *Leslie* having been completely exonerated. The facts of this case do not, therefore, bring it within the scope of the sub-section. This is no merely verbal criticism. The language of the sub-section exactly represents the rule as applied in all the cases to which we have been referred, or which I have been able to discover, which were decided before the Judicature Act. I have no doubt that the language of the sub-section was deliberately chosen so as to apply solely to cases where the two colliding ships are both to blame, to which cases alone had any special rule of the Admiralty Court been theretofore applied. Even if I was of opinion that the restricted ambit of the sub-section was due to mere inadvertence (for which view I can find no warrant either in the history or the then condition of admiralty practice, or otherwise) it would make no difference to my judicial duty. The restriction is clearly expressed in the language used in the Act, and we have no right to substitute for the language of an Act of Parliament other language which we may think the Legislature might have employed with more advantage. It follows, therefore, that the rule contended for, even if it did exist in the Admiralty Court prior to 1873, is not preserved or extended to other Courts by sub-s. 9 of s. 25 of the Judicature Act of that year. This is a matter of great importance, because the decision of the House of Lords in the case of *The Drumlanrig* (2), which finally established the rule in *The Milan* (1), was entirely based on the principle that the rule in question was expressly preserved by sub-s. 9 of s. 25 of the Judicature Act, 1873. This decision, therefore, can afford no assistance to the contention

(1) Lush. 388. (2) [1911] A. C. 16.

of the appellants in this case. But the effect of this consideration goes much deeper. The Admiralty Court did not possess exclusive jurisdiction in the matter of collisions between ships. Actions for collisions between ships in territorial waters might be, and in fact were, occasionally brought in the Courts of common law. But, prior to the Judicature Act, the law administered in such cases was different in the two Courts. If contributory negligence was proved, the plaintiff lost his cause in the Court of common law; whereas in the Admiralty Court the losses were borne in equal halves. It is evident from s. 91 of the Judicature Act, 1873, that one of its objects was to provide that one and the same law should be administered in all the Divisions of the Supreme Court, and it was evidently for this purpose that sub-s. 9 of s. 25 was inserted. By reason of its presence the law administered by the Courts of common law in the case of collisions between ships where both are to blame was changed, and those Courts are now bound to administer in such cases the law which had previously been administered by the Admiralty Court alone. If the contention of the appellants is to prevail, we reintroduce a conflict of law in the different branches of the Court. This action might have been brought in a Court of common law, and the plaintiff would then have been entitled to recover full damages as he now does under the judgment appealed from. If we give effect to the contention of the appellants and vary the judgment by giving to the plaintiff only half his damages, we shall be making the Admiralty Court administer a different law to the Court of common law. I should be very loth to hold that the Judicature Act had so signally failed in one of its main objects. I see no ground, however, for holding that this is the case. I am of opinion, on the contrary, that by sub-s. 9 the only point of difference in the law administered concurrently by the two Courts was finally removed, and that from that time the rights of the plaintiffs, in cases arising out of collisions of ships, have been and are the same in whatever Division of the Supreme Court they may bring their actions.

The contrast between the rule suggested by the appellants and the rule of the common law is very striking. The proposition

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put forward by them is that where there are three ships, A., B., and C. (as in the present case), and, without any fault on her part, A. is run into by B., through the combined negligence of B. and C., A. can only recover half her damages from B., the ship that has committed the trespass. At common law B. and C. are, at the highest, joint tortfeasors, and either can be sued separately. Even if sued jointly the judgment could be enforced in full against either. This is to my mind far juster than that which it is proposed to substitute for it. But for B.'s own negligence he would not have committed the trespass on A. The negligence of C. may have caused or increased the difficulties of B.'s position, just as any other sudden danger of the sea might do, whether caused by the misfeasances of others or not; but B. has the full value of this as a defence. If he behaved reasonably, that is, without negligence under the new difficulties, he is entitled to succeed in the action. A. only succeeds if he proves that, after making all allowances for the difficulties of his position, B. was negligent and the accident was due to that negligence. I am not enamoured of a rule that would, under such circumstances, prevent A. from recovering from the ship that has committed the trespass the full amount of the damages caused thereby.

The whole argument of the appellants rested in truth on a passage in the judgment of Dr. Lushington in the well-known case of *The Milan*. (1) That was an action brought by the owners of cargo on board the *Lindisfarne*, which was sunk by a collision with the *Milan*. The defendants were the owners of the *Milan*. Both ships were held to blame, and the question for the decision of the Court was whether the plaintiffs were entitled to recover any, and if so what part, of the damage caused by the collision. At that time the decisions at common law had established a doctrine, since pronounced by the House of Lords to be erroneous, that a passenger (and by analogy cargo) on board a vehicle was so far identified with the vehicle as to be unable to recover damages on account of a collision if there had been negligence on the part of those in charge of the vehicle. The defendants sought to apply this principle to collisions at sea, and they claimed that the defendants were in the position of joint

(1) Lush. 388.

tortfeasors with the owners of the ship on which the plaintiffs' cargo was carried, and that therefore the plaintiffs could recover no damages from the defendants. On the other hand the plaintiffs contended that they were innocent parties, and entitled to recover the whole of the damage against the defendants under the rule of the common law that one of two joint tortfeasors can be sued separately and is liable for the whole of the damage. In delivering judgment Dr. Lushington went fully into the questions raised, but dealt more especially with the question of the practice of the Court of Admiralty. He expressly declined to follow the rule of common law in preference to such practice. He decided that there was a settled rule and practice in the Admiralty Court that the plaintiff under such circumstances could recover damages from the delinquent ship, but that only one half of the actual damage suffered could be so recovered, by reason of the fact that the ship in which the plaintiffs' cargo was carried was also to blame. It is in dealing with this last point that there appears a passage which, it is suggested, gives support to the appellants' contention, and, as it is so important in this respect, I shall give it in full: "It remains, then, only to determine whether the plaintiffs can recover damages for the whole loss. There is, I apprehend, no doubt at common law that they could so recover, if they could recover at all; but I must be governed, where they apply, by the rules and practice of the Court of Admiralty. It is true, as I think, that the owner of a cargo is to be considered a perfectly innocent person, and that he does not stand in the same position as the owner of one of two delinquent ships; and if the sole ground upon which the admiralty rule rests is the joint culpability of the plaintiff and the defendant, it might well be that the owner of a cargo would recover his whole damage against the adverse ship, but this is not exactly the view taken by the admiralty law; it endeavours, whether wisely or not I do not say, to administer more equitable justice, and, generally, where both ships are delinquent, it makes the owner of each bear a moiety of the loss, and a moiety only. I apprehend that, carrying out this principle, the Court of Admiralty must say, 'You, the innocent owners of cargo, proceeding against one only of two delinquent ships, shall recover only half your damage,

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because we can affix to the vessel proceeded against only half the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the owner of the other vessel, which we hold to be equally delinquent.' It may be very true that this conclusion is not conformable with the rule of common law, and much might be said as to its equity or otherwise, but I think it is most conformable to the admiralty rule acted upon in *Hay* v. *Le Neve* (1) and other cases, and, therefore, my decree must be that the plaintiffs do recover a moiety of the damage only."

Upon this passage the appellants found the argument that it was in 1861 the rule and practice of the Admiralty Court that, in a case of a collision between ships where two vessels (not necessarily the two colliding ones) are to blame, each vessel is liable as against all parties, whether connected with any one of the vessels or not, to bear only half the liability of the collision.

I am of opinion that this contention is not supported by the judgment in *The Milan* (2) for the following reasons: In the first place, the case before the Court did not involve the decision in any way of the rights of the parties not connected with one of the delinquent ships. There is no word from the beginning to the end of the judgment which refers in any way to the rights of such parties. Indeed, the language of the judgment, if it be closely scanned, makes it clear that the learned judge was thinking only of the two delinquent ships and the cargoes carried thereon. Moreover, he does not purport to be administering new law, but, on the contrary, expressly states that he is only applying a settled rule of the Admiralty Court, and he quotes cases in support, all of which deal with the same question. And when the learned judge formulates the question which he considers to be before the Court, and to which, of course, his judgment is directed, he does so in these words: "It is this. Whether apart from the statute, both ships being to blame, the owner of goods carried in one ship is entitled to recover against the other ship, and, if so, whether the whole of his loss or a moiety only"—language which is only applicable to the narrower question, and clearly does not refer in any way to the rights of outsiders. Nor is

(1) (1824) 2 Shaw's Scotch Appeals, 395. (2) Lush. 388.

there any case on record in which the old Court of Admiralty applied the rule as to division of liability to cases other than those of collision between two delinquent ships. Secondly, the passage which for the reason I have already given could only be regarded as a dictum, so far as the rights of third parties are concerned, does not purport to lay down that there was any rule or practice of the Admiralty Court to the effect contended for by the appellants. It only purports to explain the reasoning by which the learned judge considers the Admiralty Court must have arrived at the rule of practice which existed in the limited case before him. Such a statement, though entitled to all respect, does not rise above the status of a dictum, and does not justify the contention that this suggested explanation of an existing rule was itself in all its breadth an existing rule at that date. Indeed, the learned judge guards himself by the introduction of the word "generally" in his statement of the practice of the Admiralty Court with regard to division of liability.

The cases that have been decided since the Judicature Act shew no indication of an extension of the rule as it prevailed before that Act which would make it affect third parties. The appellants, therefore, are asking the Court for the first time to introduce a rule of law conflicting with the rules of the common law as amended by s. 25 of the Judicature Act. To my mind they have shewn no justification for our so doing, or, indeed, any jurisdiction so to do.

Accordingly, I have come to the following conclusions: I find that prior to 1873 there was a clear rule and practice in the Admiralty Court relative to apportionment of the damages in actions arising out of the collision of two ships where both are to blame, but none applying to any other cases. I find a statutory enactment preserving the admiralty rules in the above case, but in none other, and directing that they should be observed in all Courts. It is not competent for the Admiralty Court since the Judicature Act to introduce, and it has not introduced, any new rules of law at variance with the rules of law obtaining in other branches of the Supreme Court. It follows, therefore, that the plaintiffs are entitled to recover their full damages from the defendants in this case, and that the judgment appealed

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against was correct, and that this appeal must be dismissed with costs.

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This is my judgment in *The Seacombe*. The owners of the barge *Dolly* and her master and crew, suing for their lost effects, and the owners of her cargo and freight sue the owners of the steamship *Seacombe* in respect of the sinking of the barge by collision with the *Seacombe* in the river Mersey in January last.

The *Dolly* was a flat without any means of propulsion of her own, carrying two hands and laden with about 100 tons of maize, and at the time of the accident she was being towed by the tug *J. M. Stubbs* from the Huskisson Dock to Birkenhead. The tug was necessarily in sole control of the navigation. The collision took place about 8 o'clock in the morning. The *Seacombe*, which was a ferry steamer, had just left the Seacombe landing stage on the Birkenhead side on her way across. There is no dispute that when the vessels first saw one another they were about 400 yards off, and the tug had the *Seacombe* about four points on her starboard bow. Under these circumstances, the respective duties of the two ships are clear. They were on crossing courses, and therefore it was the duty of the tug to keep out of the way, and for the *Seacombe* to keep her course and speed. Unquestionably, the master of the tug did not do his duty in this respect. His evidence on the point is most remarkable. He insisted that it was the duty of the *Seacombe* to keep out of his way, and deposed that he kept on at full speed. The learned judge in the Court below accordingly found that the tug was to blame, and this decision of fact was not contested before us. No evidence was called on behalf of the *Seacombe*, but in the preliminary act of the defendants it was stated that when the barge was sighted the engines of the *Seacombe* were slowed and her helm starboarded, which was in violation of her duty, which was to keep her course and speed ; and the allegations in the statement of defence were to a like effect. At the conclusion of the case, the learned judge refused to act on the statements in the preliminary act, treating them as being nothing more than statements put before the Court as in pleadings, which could not in the absence of consent be treated

as accurate. Accordingly, seeing that the evidence of the plaintiffs' witnesses did not support the starboarding of the *Seacombe*, he held that she was not to blame.

In my opinion, the learned judge took a wrong view of the nature and status of the statements in the preliminary act. They are not mere pleading allegations. They are statements of fact made under such circumstances that they rank as formal admissions of fact binding the party making them perhaps as strongly as any admissions of fact can do. An admission of fact, as such, does not constitute an estoppel. It may be shewn that it was made under mistake, and the Court may be satisfied that such was the case; but it is evidence against the party making it, its strength varying according to the conditions under which it is made. An admission, under circumstances which necessitate that it must have been made after full consideration, has an evidential value far higher than a casual admission made without any opportunity of reflection or verification. The statements of fact in a preliminary act are statements which must be presumed to be made after the most careful examination and consideration. To my mind they carry such weight, from the nature of a preliminary act and from the circumstances under which it is made, that I should doubt whether otherwise than under the most special circumstances, and with the special leave of the Court, a party would be allowed to depart from the admissions in the preliminary act, at all events as far as evidence-in-chief is concerned. The judge was, therefore, in my opinion, wrong in refusing to take the statements in the defendants' preliminary act into consideration in arriving at his decision.

On the hearing of the appeal, plaintiffs' counsel asked leave to call the master of the *Seacombe* as his own witness, and, under the circumstances, permission was granted. His evidence left no doubt in my mind that the statement in the preliminary act was correct, and that the *Seacombe* starboarded and did not keep her course and speed as it was her duty to do. I, therefore, am of opinion that the *Seacombe* was also to blame for the collision. No one suggests that the barge did anything which contributed to the collision, or was herself to blame in any way. Hence the

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case is one in which a barge which is being towed by a tug which has complete control of the navigation suffers damage by collision from a third vessel by the joint negligence of the tug and the third vessel. It is thus identical in all respects with the case of *The Devonshire*, on which we have just given our decision.

I am of opinion, therefore, that the plaintiffs are entitled to recover from the defendants the whole of their respective damages, with costs of action, and that this appeal must be allowed with costs.

BUCKLEY L.J. I will take the case of *The Devonshire* first. The dumb barge *Leslie* was in tow of the tug *St. Winifred*. The *Leslie* and the steamship *Devonshire* came into collision. The *St. Winifred* and the *Devonshire* were both to blame. The *Leslie*, in a cause of collision brought by her against the *Devonshire*, to which the *St. Winifred* is not a party, has recovered judgment against the *Devonshire* for the whole of her damage. The learned President has not in so many words said that, but from his judgment it necessarily follows that he held the *Leslie* not to blame. The appellants say that the admiralty rule of division of loss applies, and that the *Leslie*, although innocent, can recover against the *Devonshire* only half her loss. We have to determine whether this contention is right.

The *Leslie* was a tow. For some purposes tug and tow are, by intendment of law, regarded as one ship. The judgment under appeal has, of course, not treated them as one. If they were one, the *Leslie* would have been to blame, and could not have recovered more than half. The first question is whether, for the present purpose, the *St. Winifred*, which was to blame, and the *Leslie*, which was not, are to be treated as one ship.

As matter of fact, tug and tow are two separate floating bodies. Each may be, and generally is, furnished with separate means of propulsion. Each may be, and generally is, furnished with separate means of steering. The tow may be a steamship or a sailing vessel, and she may, and sometimes does, use her

own means of propulsion to assist the tug in their joint voyage. The tow can, by her helm, command, within limits, her direction of motion. She does, in fact, owe the maritime duty towards other vessels of using her helm and, under appropriate circumstances, her steam or other means of propulsion or control, so as to avoid collision. She is not, like cargo, a passive spectator of the manœuvres. She owes a duty to play a part in them, and is to blame if she plays a wrong part. In this I am not speaking of the responsibility of the tow for the conduct of the tug, but of her responsibility for her own conduct. Upon the principle which often applies, that the tug is the servant of the tow, the latter may be to blame for the acts of the former. Of this *The Ticonderoga* (1), where the collision was between a third vessel and the tow, is one example, and *The Niobe* (2), where the collision was between a third vessel and the tug, is another. *The Niobe* came up again (3) in an action against the underwriters upon the policy of insurance. In that instance the question of the meaning of the policy was, of course, involved. But the tow is not necessarily liable. If the governing as well as the motive power is wholly with the tug, the tow may not be liable in damages for the collision, even where the tow has herself been in collision with the third vessel: see *The American and The Syria* (4) and *The W. H. No.* 1. (5) The last-mentioned case is instructive upon the existence in the tow, as distinguished from the tug, of duties of manœuvring by the use of her own helm. *The Quickstep* (6) was again a case of collision between tug and third vessel. The county court judge found the tug only to blame, but held tug and tow both liable. On appeal by the tug, and on appeal by the tow, the third vessel and the tug were pronounced both to blame, and the tow was held exempt from liability for the negligence of the tug.

From these decisions it results, unless we are prepared to differ from them, that tug and tow are not necessarily one vessel, and that even a tow in collision may successfully say that not she, but the tug, was to blame. The proposition is easier when

(1) (1857) Swa. 215.
(2) (1888) 13 P. D. 55.
(3) [1891] A. C. 401.
(4) L. R. 6 P. C. 127.
(5) [1911] A. C. 30.
(6) 15 P. D. 196.

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not the tow, but the tug, has been in collision, and the fault is with the tug. Of this *The Mary* (1) is an instance. The tow was there not liable, because she was in charge of a compulsory pilot. The collision was between the tug and a third vessel. The tug was found alone to blame. It was held that she was not exonerated by the fact that the tow was in charge of a compulsory pilot, and judgment was given for the third vessel against the tug. If the collision had been between tow and third ship by the fault of those on board the tow, there is no difficulty. The tow is liable to the third ship for damage caused by those on board the tow.

From these considerations it is, I think, clear that if there are three floating bodies, tug, tow, and third ship, there are prima facie three ships, and not two ships, for the purpose of investigating liability for collision between any two of the three, and that it is only under circumstances, of which there are many illustrations in the books, that two out of the three—namely, tug and tow—are to be regarded as one vessel, so as to reduce the number of vessels constructively for purposes of liability from three to two. The appellants are not in a position to argue, and have not argued, that, as a matter of fact, the tow was here to blame, for the President has found her not to blame, and they have not sought to review his finding of fact. They have sought to argue that, as matter of law, she is responsible for the wrongful acts of the tug. But this, I think, is not open to them. No part of the evidence has been brought before us. We have been invited to deal with the case upon the judgment alone, and upon the points of law involved in the judgment. It follows from what I have said that a tow is not, in my opinion, liable in law for the tug, merely because of the relation of tug and tow. Whether she is liable or not depends upon facts, and by finding the tow free from blame the learned judge must have found those relevant facts in favour of the tow.

The result thus far is that the right to damages is here to be considered upon the footing that there are three ships, and that the innocent ship has been injured by one of the two ships to blame: A. innocent; B. and C. to blame. Collision

(1) 5 P. D. 14.

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between A. and C. Is A. entitled to recover from C. whole or half damages?

The origin and history of the admiralty rule as to division of loss, as laid down in *Hay* v. *Le Neve* (1) and subsequent cases, might form the subject of a treatise. If the case be one of collision between two ships, both to blame, the rule that each shall pay half the loss of the other may rest upon either of one of two principles, if it rests upon any principle at all. The one is that neither wrong-doer shall be rendered liable for more than his share of the injury. This, if adopted, would logically lead to proportional incidence of loss, a result which has prevailed in the maritime codes of other countries, but not of this country. The Admiralty Court has abandoned proportion and adopted equality. The rule is that, as both are to blame, a rough division shall prevail, and, as each caused some of the injury, each shall bear half the loss. It does not require much argument to shew that in such a rule there is not much principle. The principle (if it be one) is a principle which looks at the misfortune from the wrong-doer's point of view and holds him free from liability, except as to such fraction as is to be attributed to him, and arbitrarily fixes that fraction at one half. The other principle is that in a loss arising from a common fault equality of participation is justice. Counsel for the owners of the *Devonshire* urged the former strongly upon us, and said truly that this principle, if adopted as of application, not only to collision between two ships, both to blame, but also to all cases of collision, will furnish an explanation for the decisions that cargo (although innocent) is within the rule of division of loss—*The Milan* (2)—and that where one of the two ships is in charge of a compulsory pilot she can recover but half damages, although not liable herself in damages at all: *The Hector*. (3) There are, I think, grounds for saying that it was upon such a principle that *The Milan* (2) was decided. The judgment emphatically repudiates identification of cargo with ship, and proceeds, I think, upon that which is found in the concluding words of the judgment: "You, the innocent owners of cargo proceeding

(1) 2 Shaw's Scotch Appeals, 395. (2) Lush. 388.
(3) (1883) 8 P. D. 218.

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against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame." But, on the other hand, if this be the principle which the Court of Admiralty has regarded as right, then it seems to me to follow that in the Admiralty Court a plaintiff who claims damages for personal injury not resulting in death, and an innocent third ship, which suffers injury from the wrongful acts of two other ships, which are to blame, ought each to recover from either of the two wrong-doers but half his damages. In the former case, however, the plaintiff recovers full damages, although we have not been referred to any reported case in which his right so to do has been considered and affirmed, and in the latter there is express authority in *The Avon and Thomas Joliffe* (1) that at the suit of the innocent third ship each of the two ships to blame is liable for the whole. The last-mentioned case is open to review in this Court, but I cannot see that the present appellant can succeed, and that case remain good law. It is true that the two ships to blame were tug and tow, but nothing turned upon that fact. Butt J. decided the case upon the footing that the admiralty rule as to apportionment (I prefer to say division) of damage where both vessels are to blame did not apply. The fact that where the injury results in death damages under Lord Campbell's Act are recoverable in full (*The Bernina* (2)) does not assist the matter one way or the other, for the Court of Admiralty had no jurisdiction to entertain such an action, and the Judicature Act, 1873, s. 25, sub-s. 9, did not apply.

The second supposed principle, that in a loss arising from a common fault equality of participation is justice, is one which furnishes an explanation applicable in the case of two ships both to blame, but fails to explain any other case. This origin of the rule seems to be traceable in Sir William Scott's words in *The Lord Melville* (3): "The ancient rule of the Admiralty was that it should be considered a common loss to which they (the two parties) were jointly (not justly) liable"; and in *The*

(1) [1891] P. 7.
(2) (1888) 13 App. Cas. 1.
(3) (1816) cited in 2 Shaw's Scotch Appeals, 395, at p. 402.

Woodrop Sims (1): "the loss must be apportioned between them as having been occasioned by the fault of both of them." Mr. Marsden, in his work on Collisions at Sea, at p. 124, says that "The principle of the rule is said to be equality of participation in a loss arising from a common fault." It is obvious, however, that this principle by its very terms is applicable only as between parties who are guilty of a common fault. To an innocent party it has no application. It cannot be that the Court of Admiralty applied to the case of an innocent cargo owner a principle which for its application required that he should be regarded as party to a common fault, unless it attributed fault to him by identification. Identification, however, is expressly disclaimed in *The Milan*. (2) The principle fails altogether to explain the case either of cargo or of compulsory pilotage, and contains within it nothing which can govern the case of a person who has been no party to a common fault.

Neither of these suggested principles being capable of satisfying a critical investigation, I should, even if the case with which I had to do fell within the Judicature Act, 1873, s. 25, sub-s. 9, have hesitated to say that either of them constituted a "rule hitherto in force in the Court of Admiralty." I agree that those words import not merely concrete cases, in which a particular course has been taken,—e.g., the particular case of cargo—but import a rule of which concrete cases furnish an illustration, and if I had to do with a case within those words, I should look for a principle and not confine myself to looking for concrete cases. But it seems to me that s. 25, sub-s. 9, does not apply here. It is confined to the case of "collision between two ships, if both ships shall be found to have been in fault." The present is the case of a collision between two ships, of which only one has been found to be in fault. There was a third ship, which was also in fault, but she was not in collision. I am therefore left unfettered by the Judicature Act to say what is the liability of the *Devonshire* to the *Leslie*, when the *Leslie* was not to blame.

First, in principle: If A. has suffered by the combined effect

(1) (1815) 2 Dods. 83, at p. 85. (2) Lush. 388.

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of wrongs done by B. and C., the case may differ according as B. and C. concur in doing one and the same wrongful act (e.g., concur in assaulting A.), or as B. and C. each do separate acts, with the result that from the combined effect of their separate negligent or unlawful acts A. suffers injury (e.g., where one omnibus negligently sets A. down in the middle of the road, and another negligently runs over him). The present case is one of the latter kind. As between A. on the one hand and B. and C. on the other, why should not each be liable for the whole although as between B. and C., inter se, it may be just that each should only bear his share? This, which would be theoretical justice as between all parties, has, at common law, been defeated by the common law rule forbidding contribution between tortfeasors. But the common law did not, by reason of that fact, shrink from giving A. that to which he, as an innocent party, was entitled. On principle it seems to me that A. is entitled to recover the whole from either one, and is not to go unsatisfied because one of the tortfeasors may be insolvent; or that, at any rate, he is entitled to the whole from that one which did him the injury by in fact wrongfully coming into collision with him. At law A. would be entitled to recover the whole. Is there any tide of authority to shew that he has not the same right in the Court of Admiralty? There are these authorities to shew that he has: *The Avon and The Thomas Joliffe* (1); *The Englishman and The Australia* (2); and *The Frankland*. (3) We have not been referred to any authority to shew that he has not. In this state of the authorities I feel myself at liberty to adopt the rule which seems to me to be right, and to hold that the innocent *Leslie* is entitled, as against the blameworthy *Devonshire*, which wrongfully collided with her, to recover, not half, but the whole of her damage; and I so hold. The result is that the appeal should, in my judgment, be dismissed with costs.

This is my judgment in *The Seacombe*. The *Seacombe*, in my opinion, was to blame. Her duty was to keep her course and

(1) [1891] P. 7. (2) [1894] P. 239, at p. 246.
(3) [1901] P. 161.

speed. By their preliminary act her owners stated that, after the *Dolly* was first seen, the engines of the *Seacombe* were slowed, and her helm starboarded. By paragraph 3 of their defence they stated that, having observed the tug and tow at a distance of about 500 yards, the *Seacombe* starboarded her helm, slowed her engines, and then stopped them. The owners of the *Dolly* called the master of the *Seacombe*, who stated that his order was "starboard, we will work astern of the flat," and that by starboarding he was going to get out of the way of the flat, and, in cross-examination, that he did not think it necessary to give that order so as to avoid a collision, and that he starboarded before the tug altered her course; and, in re-examination, that, inasmuch as the tug and tow shewed no signs of going astern of him, he thought he would go astern of them, and, further, that he blew no helm signal. The *Seacombe* has no answer to these admissions on the pleadings and this evidence of her own master, except that some evidence called by the *Dolly* was to the effect that those on board the *Dolly* did not see the starboarding by the *Seacombe*. It is, in my opinion, really impossible to contend that upon these pleadings and this evidence the *Seacombe* was not to blame.

This being so, and the tug being also to blame, it remains to determine what are the rights of the owners of the tow, and the owners of the cargo and effects on board the tow, when no blame is attached to the tow as distinguished from the tug.

I have discussed this point at length in my judgment in *The Devonshire*. It results that the appellants are, I think, entitled to succeed, and that judgment ought to be entered for the plaintiffs for the whole of their damages, with the costs of the action and of this appeal.

Appeal by the owners of the barge Dolly and others in the case of the Seacombe allowed.

Appeal by the owners of the steamship Devonshire dismissed.

Solicitors for the appellants (plaintiffs), the owners of the barge *Dolly* and her master and crew, suing for their lost effects,

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and the owners of her cargo and freight: *Hill, Dickinson & Co., Liverpool.*

Solicitor for the respondents (defendants), the owners of the steamship *Seacombe*: *H. W. Cook, Wallasey.*

Solicitors for the appellants (defendants), the owners of the steamship *Devonshire*: *Collins, Robinson, Driffield & Kusel, Liverpool.*

Solicitors for the respondents (plaintiffs), the owners of the barge *Leslie* and her master and mate, suing for the loss of their effects: *Batesons, Warr & Wimshurst, Liverpool.*

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THE DEVONSHIRE AND ST. WINIFRED.

On January 16, 1912, an action of damage by collision was heard by Bargrave Deane J. brought by Petrocochino Brothers and Edwin Butterworth & Co., the owners of the cargo on board the flat or barge *Leslie*, against the owners of the steamship *Devonshire* and the owners of the steam tug *St. Winifred*. The plaintiffs claimed damages sustained by a collision between the barge *Leslie*, whilst in tow of the steam tug *St. Winifred*, and the steamship *Devonshire* in the river Mersey on February 4, 1911, owing to the negligence of the defendants or one of them. The defendants were sued jointly and severally and in the alternative. In accordance with the above decision of the Court of Appeal in *The Devonshire*, the learned judge gave judgment for the cargo owners against both the owners of the *Devonshire* and the owners of the *St. Winifred* for the full amount of the damage sustained, staying execution, except as to half damages against each of the two defendants, pending an appeal to the House of Lords by the owners of the *Devonshire* in the action by the owners of the barge *Leslie*, and refusing an application, made by the owners of the *St. Winifred*, for the suspension of any order against them pending the determination of a third party question as to their being entitled to an indemnity from the owners of the barge.

C. Robertson Dunlop, for the plaintiffs, the owners of cargo lately laden on board the flat or barge *Leslie*.

Dawson Miller, for the defendants the owners of the steamship *Devonshire*.

W. Norman Raeburn, for the defendants the owners of the tug *St. Winifred*.

Solicitors for plaintiffs: *Lightbound, Owen & Co., Liverpool.*

Solicitors for defendants, the *Devonshire*: *Collins, Robinson, Driffield & Kusel, Liverpool.*

Solicitors for defendants, the *St. Winifred*: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

[IN THE ARCHES COURT OF CANTERBURY.]

APPEAL FROM THE CONSISTORY COURT OF GLOUCESTER.

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Dec. 6, 8.

CORKE *v.* RAINGER AND OTHERS AND *v.* HIGGS AND OTHERS.

Ecclesiastical Law—Faculty—Jurisdiction—Grant of Faculty for Erection on Consecrated Ground not used for Burials of Non-provided School where Religious Instruction will be given according to the Principles of the Church of England—Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 7, 23—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 5; *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 1 (*a*) (*b*), (*d*), *and sub-s.* 5—*Discretion—Substantial Ecclesiastical Purpose—Effective Control of Church Authorities over Religious Instruction—Practice—Appeal by Notice of Appeal.*

The Ecclesiastical Courts have jurisdiction in their discretion to grant faculties authorizing the erection on consecrated ground of the buildings of public elementary schools not provided by the local education authority in cases where it is proved that in the buildings so to be erected religious instruction will be given according to the principles of the Church of England and that interments have never taken place in the ground upon which it is proposed that the school buildings shall be erected.

Decision in *In re Bettison* (1874) L. R. 4 A. & E. 294, followed.

THIS was an appeal from the Consistory Court of Gloucester in a cause of faculty instituted on behalf of the Reverend Hubert Alfred Corke, perpetual curate of the parish of Holy Apostles, Charlton Kings, in the county and diocese of Gloucester, for the purpose of obtaining a faculty to authorize (1.) the erection of new public elementary schools on consecrated ground adjoining the parish church of Holy Apostles aforesaid; (2.) the sale or gift of a strip of such consecrated ground for widening or straightening a public road. The application in the Court below to authorize by faculty the erection of new public elementary schools on the site proposed was opposed by two sets of objectors, namely, by Charles Henry Rainger, Thomas Burt Woodard, and Adam Embrey Owen, parishioners of the parish of Holy Apostles; and by John Charles Prichard Higgs, Richard Vassar Vassar-Smith, and George Ricketts Bonnor, owners of land in the parish as trustees of the will of Charles Cook Higgs, by whom the existing public elementary schools in the parish for which

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the new public elementary schools were proposed to be substituted had been erected.

Separate acts on petition were brought in on behalf of the two sets of objectors, in each of which they pleaded, inter alia, that "the Court had no power to grant the proposed faculty for consecrated ground to be used for secular purposes."

A responsive allegation brought in on behalf of the promovent alleged that the promovent believed and was advised that the Court had full power and authority to grant the faculty permitting consecrated ground to be used for the proposed school, namely, a school in connection with the Church of England, as part of the ordinary ecclesiastical organization of the parish, which is not a secular purpose. The responsive allegation further alleged that the above-mentioned consecrated ground (which included the site of the proposed new schools) was vested in the promovent as incumbent for the time being of the parish of the Holy Apostles under the provisions of the Act 8 & 9 Vict. c. 70.

The hearing of the cause in the Court below took place on May 2 and 13, 1911, and after witnesses had been examined in support of the petition and the acts on petition of the objectors, the Chancellor of the diocese of Gloucester (His Honour Judge Ellicott) delivered judgment refusing for want of jurisdiction to grant the faculty for the erection of the proposed new school. With regard to the application for a faculty authorizing the sale or gift of a strip of the consecrated ground for widening or straightening a public road he stated that "he had said nothing about the widening of the road because the counsel for the promovent intimated that he would abandon that part of the petition if there was any difficulty about its being granted." From the minute of the decree to be entered in the registry of the Court below in pursuance of the above judgment the promovent appealed to this Court. The appeal was asserted by a notice of appeal under the rules of the Arches Court of September, 1903. (1)

1911. Dec. 6. On this day the appeal was heard before the Dean of the Arches (Sir Lewis Tonna Dibdin, D.C.L.).

(1) See *Markham* v. *Shirebrook Churchwardens*, [1906] P. 239, in a note to which report the rules in question are printed (at p. 262).

R. J. Neville and *F. S. A. Barker* appeared for the appellant, the promovent in the Court below. The judge of the Court below was wrong in holding that he had no jurisdiction to grant the faculty as prayed. The consecrated ground in this case will be used for substantially an ecclesiastical purpose, as the school proposed to be erected will be a non-provided school and managed and conducted so far as regards the religious instruction given therein in accordance with the principles of the Church of England. And this being so, there is clearly jurisdiction to grant the faculty, there being nothing in the Education Act of 1902 to alter the law on this point, and the decision of this Court in *In re Bettison* (1) being still a ruling authority in favour of the jurisdiction and one which ought to be followed in the present case. [They also referred to Burn's Ecclesiastical Law, ed. 1842, vol. 3, p. 556; *The Rector of St. George, Hanover Square* v. *Steuart* (2); *Attwood* v. *Hammersmith Churches* (3); *Reg.* v. *Twiss* (4); *Campbell* v. *The Parishioners of Paddington* (5); the Education Act, 1902, s. 5, s. 6, sub-s. 2, s. 7, sub-s. 1 (*a*), (*b*), (*d*), and sub-s. 5; *Attorney-General* v. *West Riding of Yorkshire County Council.* (6)] Indeed *In re Bettison* (1) is in all respects a case on all fours with the present case, and if the Court follows that case as to the jurisdiction, the opinion of the judge of the Court below on the merits that if he had had jurisdiction he would have granted the faculty in his discretion ought to prevail.

Sankey, K.C., and *Harold Hardy*, for objectors, the trustees of Charles Cook Higgs, deceased. The case of *In re Bettison* (1) is not in pari materia with the present case, and whatever may have been the position under the Act of 1870, the Education Act, 1902, contains provisions which prevent that decision applying to the case now before the Court. Moreover, the consecrated ground in *Bettison's Case* (1) was a disused burial ground; and indeed it will be found that in all the reported cases where faculties have been granted for widening roads the churchyards affected were disused burial grounds, and the reasoning of the

(1) L. R. 4 A. & E. 294.
(2) (1740) 2 Str. 1126.
(3) (1836) cited 5 Jur. (N.S.) 300
(4) (1869) L. R. 4 Q. B. 407.
(5) (1852) 2 Rob. 558.
(6) [1907] A. C. 29, 42.

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decisions in those cases was that an Act of Parliament had prevented the churchyards being used for the purposes for which they had been consecrated, so that they could for that reason be used for other purposes than ecclesiastical uses. [They referred to *In re Parish of Bideford.* (1)] Nothing, however, has occurred in the present case—the ground having never been used for burial—to prevent the general law applying, that ground once consecrated cannot be authorized by the Ecclesiastical Courts to be applied to secular uses: *Harper* v. *Forbes* (2); *Reg.* v. *Twiss* (3); *In re Plumstead Burial Board.* (4) Consecrated ground must be used for ecclesiastical uses, as, for instance, for burial, or a national school which was under the complete control of the Church authorities. Such complete control cannot exist in the case of a non-provided school under the Education Act, 1902. Thus representative managers may be appointed under s. 6 of that Act, and assistant and pupil teachers may be appointed to non-provided schools without regard to religious creed or denomination under s. 7, whilst under s. 7 of the Act of 1870 it is conceivable that every scholar in non-provided schools where religious instruction is given may be withdrawn from religious instruction. [They also cited *Fuller* v. *Alford* (5), *Hughes* v. *Lloyd* (6), *Hansard* v. *St. Matthew, Bethnal Green* (7), and *The Rector of St. George's, Hanover Square* v. *Hall.* (8)]

R. Winterbotham, for other objectors, parishioners of the parish of Holy Apostles, Charlton Kings.

Cur. adv. vult.

Dec. 8. THE DEAN OF THE ARCHES. This appeal relates to a petition by the vicar of Holy Apostles, Charlton Kings, in the diocese of Gloucester, asking for a faculty to permit the erection of an elementary school in which religious instruction would be given according to the principles of the Church of England, on a piece of consecrated ground not used for burials, near the church. The petition also asked that a portion of the

(1) [1900] P. 314.
(2) (1859) 5 Jur. (N.S.) 275.
(3) L. R. 4 Q. B. 407.
(4) [1895] P. 225
(5) (1883) 10 Q. B. D. 418.
(6) (1888) 22 Q. B. D. 157.
(7) (1878) 4 P. D. 46.
(8) (1879) 5 P. D. 42.

ground might be authorized to be used for road widening, but that part of the petition has been abandoned. The petition was supported by a resolution of vestry and by one of the churchwardens. It was opposed by four parishioners, owners or occupiers of houses in the neighbourhood, and by the trustees of the will of the donor of the land, church, and other parochial benefactions. The petition was heard by the Chancellor of the diocese of Gloucester in his Consistory Court and was by him dismissed with costs. The petitioner appealed to this Court.

The area involved is a wedgelike piece of land lying between two roads which meet and form a fork. At the point of the wedge there are school buildings built by the testator many years ago and used as a voluntary or non-provided Church school. The authorities have decided that if they are to continue as public elementary schools the buildings and premises must be greatly enlarged, and, indeed, so far as infants are concerned they have for some years ceased to be so used. There is no room for enlargement on the present site. The next section of the wedge behind the existing school buildings is occupied by the church built by the testator. Behind that is a wide strip of land which was consecrated at the same time as the church but not specifically as a burial ground. It has not in fact been so used, and, as house building proceeds in the neighbourhood, is increasingly unlikely to be capable of being so used. This is the site on which it is proposed to erect new schools. Behind that again is a residence and grounds called Langton House, also given by the testator and held on trusts for the benefit of the church, of the schools, and, in certain events, of the incumbent. There are certain trust funds provided out of the testator's estate which may, if the trustees and the Board of Education think fit, be applied towards the expense or part of the expense of the erection of new school buildings and of their subsequent maintenance in repair.

The learned Chancellor, who appears to have personally inspected the land, came to the conclusion that so far as the merits were concerned the petitioner had made out his case. Dealing with the various objections advanced by the opponents

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and their witnesses, he said: "I am not satisfied that there would be sufficient accommodation when the present schools are closed or converted into infant schools. The population of Charlton Kings is shewn to be increasing, a better class of residential houses is being built, and the proposed site, though not central enough for civil purposes, appears to be preferable to either of the alternative sites, which latter moreover are not shewn to be in the market. The danger to children would I think be less rather than more because the school exits would be both on the same side, and that side away from the trams, and the danger on the Cirencester side could be reduced by notice boards." This refers to the risk to children attending the schools by reason of traffic in the two roads already mentioned, a point insisted on by several witnesses. "The depreciation to property is I think exaggerated except as regards Langton House. The nuisance from noise would decidedly affect the comfort of the tenant of Langton House, and that and the cost of the schools themselves (which was provisionally put at 3500*l.*) are the strongest arguments to be found against the faculty. The question of cost, however, is one for the parish, and balancing the advantages against the disadvantages I should have decreed the faculty if I had the power subject to the necessary consents being obtained and to the trustees getting a scheme."

I see no reason to doubt that the Chancellor's conclusion on the facts is the right one, and having read the shorthand notes of the evidence I concur in it.

But the learned Chancellor refused the faculty because, as I understand his judgment, he was of opinion (1.) that he had no jurisdiction to authorize the use of consecrated land for the proposed school, and (2.) that, even if he had jurisdiction, he ought to refuse to exercise it on the ground that control by the ecclesiastical authorities over the school and buildings would be precarious and imperfect. Now the law applicable to this case may be briefly stated. Land once consecrated cannot be used for secular purposes, subject to this exception, namely, that having regard to the case of *In re the Parish of Bideford* (1),

(1) [1900] P. 314.

decided in this Court by my learned predecessor Sir Arthur Charles, it must be taken that the Ordinary has jurisdiction by faculty to allow a disused churchyard, which has been closed for burials, to be used for a secular purpose. If that case is to be reconsidered it must be by the Judicial Committee of the Privy Council. I consider myself bound to follow it. But the question here is not whether this land, which although consecrated and unused is neither a disused churchyard nor a churchyard at all, can be used for a secular purpose, but whether the purpose to which it is proposed to be put is secular or ecclesiastical. If the former, the petition must be refused because I have no jurisdiction to grant it; but if the latter, then there is undoubted jurisdiction to decree the faculty asked for.

It is proposed that the new schools should be non-provided schools and should be governed by a trust deed so framed as to secure that the religious instruction given in the schools should be in accordance with the principles of the Church of England. *In re Bettison* (1), decided in this Court by my learned predecessor Sir Robert Phillimore, is an express authority for granting a faculty for such a school on consecrated land. Although the case was unopposed it was evidently a good deal considered, and the minute of the decree is given in full. It is clear that the decision turned not on the view that a closed churchyard can be applied to secular purposes, but on the view that the proposed use was a proper one for consecrated land, that it was an ecclesiastical purpose. *In re Bettison* (1) was decided in 1874, after the Education Act of 1870 (33 & 34 Vict. c. 75), and has to my knowledge been frequently followed since. It is, however, said that the position of things has been changed by the Education Act of 1902 (2 Edw. 7, c. 42), and that the introduction of representative managers (s. 6, sub-s. 2) and the provision that assistant and pupil teachers are to be appointed without reference to religious creed and denomination (s. 7, sub-s. 5) have so diminished the effective control of the Church authorities in respect of these schools as to render *In re Bettison* (1) no longer applicable. I do not think that is so. It was the religious teaching according to the principles of the Church of England to

(1) L. R. 4 A. & E. 294.

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be given in the school which was the governing factor in *In re Bettison* (1), and the arrangement as to that is precisely the same under the Act of 1902 (s. 7, sub-s. 6) as under the Act of 1870. I consider, therefore, that this case is indistinguishable from *In re Bettison.* (1)

The test of what is a sufficient ecclesiastical use for the purpose in hand I take to be this. The ecclesiastical purpose must be a substantial and not an incidental part of the whole scheme. Thus a church vestry is allowable on consecrated ground although secular business may sometimes be transacted within its walls. A churchyard path is allowable although persons may pass along it who are not going to church. On the other hand a workhouse or a prison is not rendered ecclesiastical by the fact that somewhere in the building a room is set apart as a chapel. Applying this test it seems impossible to say that religious teaching is not a substantial part of the scheme of a non-provided school. The intended use of the building for a Sunday school and for religious classes on some weekday evenings is as it seems to me also material to be borne in mind when we are considering whether the purpose of the building is secular or ecclesiastical. I think, therefore, I have jurisdiction to grant the faculty asked for.

The further question remains whether having regard to the statutory provisions limiting the powers of the Church authorities in regard to Church schools and increasing those of the public education authorities (local and central) I ought in the exercise of my discretion to grant this faculty. I think the danger of the school becoming wholly secular, as, for example, by all the scholars taking advantage of the conscience clause (33 & 34 Vict. c. 75, s. 7)—a most improbable contingency—can be largely met by the proposed trust deed being framed in a suitable manner. Again the risk—if it be one—of the school being transferred to the local authority and so ceasing to be a Church school (33 & 34 Vict. c. 75, s. 23) can only arise if two-thirds of the managers and subscribers concur in that course. The possibility of difficulty emerging in the event of the local education authority requiring alterations or additions to be made

(1) L. R. 4 A. & E. 294

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to the buildings which the Ordinary may not think proper to sanction by faculty, or as to which his authority is ignored, is a real one, but in my opinion is not a sufficient ground for refusing this faculty. I think it is enough if, as will be the case, the Church authorities retain effective control over the religious instruction given in the school and the Ordinary's jurisdiction over the site of the school is not surrendered.

I think, therefore, this appeal must be allowed. The faculty will be of a somewhat tentative character because before the schools can be built the trustees and the Board of Education must be satisfied and must consent to the application of an adequate portion of the trust funds and must approve plans. It is thus quite possible that the faculty will never come into operation. For this reason I think it would not be right to make the opponents pay costs, and I make no order as to costs, leaving each party to bear their own, both here and below.

I propose to retain the cause, and the parties can, if necessary, attend me in chambers as to the terms of the faculty.

Appeal allowed.

Solicitors for appellant: *Baker & Nairne.*

Solicitor for objectors Higgs and others: *G. R. Bonnor.*

Solicitors for objectors Rainger and others: *Winterbotham, Gurney & Co.*

C. F. J.

1912
Jan. 11.

W. *v.* W. (otherwise L.).

Nullity—Non-consummation—Parties never under the same Roof—Wilful and Wrongful refusal of Co-habitation—Refusal to submit to Medical Inspection—Inference of some Impediment—Decree.

Although the parties to a ceremony of marriage may have never since the date of the marriage lived under the same roof, it is competent to the Court, if satisfied of the bona fides of the suit, to infer—from the wilful and wrongful refusal of the one party (in this case the wife) to live with the other, coupled with the further refusal of the same party to submit to medical inspection—that there is some impediment to consummation, and to pronounce a decree nisi for nullity of marriage at the suit of the party wronged.

This was the hearing (in camera) of the husband's petition for nullity.

The parties, who were both young, had known and frequently met each other for three or four years before the ceremony of marriage.

The families of both parties had lived in Ireland, but at the time of the celebration of the marriage the respondent and her parents had left Ireland and were residing in England.

The marriage took place clandestinely at a registrar's office in London. The petitioner was making a short stay in London at that time.

After the ceremony the petitioner and respondent lunched together at a restaurant and then walked about London; and later in the afternoon they had tea together at a hotel, the petitioner returning to Ireland the same night.

The petitioner saw the respondent on two or three occasions at a seaside resort in England, where the respondent was staying with her parents. The marriage was kept secret from the respondent's parents at her request, and the petitioner did not tell his parents of it. He asked her to live with him, but she said she would not do so till April. She afterwards wrote and told him that her parents had found out all about the marriage, and he thereupon wrote asking her to join him. This was before April. The petitioner next heard that the

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respondent had gone to a certain place in Africa with her parents, where she remained for two or three years. He wrote to her there, asking her to join him and live with him. She never did so.

In 1910 the petitioner met an uncle of the respondent in Ireland, and in consequence of what he said, the petitioner insisted on seeing the respondent, and he came over to London and saw her in Whitehall at a solicitor's office, the address of which he appeared to have forgotten. He asked her to come and live with him: she stated that she had decided not to do so, but gave the petitioner no reasons for her refusal.

The petitioner did not accept this as final. On two or three subsequent occasions when he was over in London he met the respondent by appointment, and on each of these occasions he tried to persuade her to change her mind and go and live with him, but she still refused.

The petitioner subsequently wrote the following letter to the respondent.

"June 30th, 1911.

"My dear ——,

"The unhappy position in which you and I are placed must no longer continue. I have looked at your persistent refusal to live with me from every point of view and have generally come to the conclusion that the real and only cause must be of a physical nature. Though you may not be conscious of this yourself, yet will you not, for the sake of our future happiness, take medical advice? I beg you, my dear, to do this, so that we may live together as man and wife should, and forget these last sad years and all the sorrows that they have brought with them.

"Your affectionate husband,

"——."

The respondent answered this within a week as follows:—

"Dear ——,

"I have received your letter of June 30th, which I have thought over carefully. It is quite useless my taking medical advice as you suggest: I can never be a wife to you and (you) must take what steps you think right.

"——."

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The petition, which was dated July 7, 1911, alleged that a ceremony of marriage was celebrated in London in January, 1907; that the parties never lived together; that the marriage had never been consummated; and that the said (wife) was at the time of the said ceremony of marriage and still remained incapable of consummating the same; and that such incapacity was incurable by art or skill, as would appear on inspection.

The petition was served personally on the respondent and an appearance was entered on her behalf, but no answer was filed, and the case was set down in the undefended list.

Only the petitioner presented himself for examination by the medical inspectors, who on September 13, 1911, reported that he had "on his part nothing to prevent the consummation of marriage."

On September 20, 1911, the solicitors for the respondent wrote to the solicitors for the petitioner as follows:—

"Dear Sirs,

"We beg to acknowledge receipt of the notice which you have served upon us to-day, notifying us that the medical inspectors have made an appointment for October 2nd next, at 12.30, for the medical inspection in this case.

"We have already informed you that our client has instructed us that she does not intend to attend the appointment, but we shall attend at the registry on her behalf in order to explain her non-attendance.

"Yours truly,

"Lewis & Lewis."

Barnard, K.C., and *Willock*, for the petitioner. There is undoubtedly wilful and wrongful refusal on the part of the respondent, and it is for the Court to draw the inference that there is also some impediment. There is no difference in principle whether the parties have been under the same roof or whether the respondent has always refused to come under the same roof. The nearest case is *C.* v. *C.* (*otherwise H.*) (1), decided by Bargrave Deane J. in April, 1911. The strongest reported case of wilful

(1) (1911) 27 Times L. R. 421.

refusal is *F.* v. *P.* (*falsely called F.*). (1) [They also referred to *S.* v. *A.* (*otherwise S.*). (2)] In the present case the respondent has entered an appearance to the citation, and under advice she has refused to be examined. The Court should infer some impediment.

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Sir Samuel Evans, President. I cannot say that I think the law is in a very satisfactory state, because it has been laid down that wilful and wrongful refusal alone is not a ground for a decree of nullity of marriage.

There is very little else in this case.

But there was in the case of *C.* v. *C.* (3), decided by Bargrave Deane J. in April, 1911, very little else except some statements alleged to have been made by the wife.

In view of the judgment of the President (Sir Francis Jeune) in *F.* v. *P.* (1), it appears to be sufficient to say that there may be incapacity of some kind which may be inferred from mere wilful refusal of marital intercourse. The President said in that case: "The ground 'wilful and wrongful refusal' is insufficient to my mind. It seems to be equally clearly held that, where the facts are that a woman refuses with no ground that anybody can see, except some incapacity in the more general sense of the word, one is entitled to say the facts point, not to wilful and wrongful refusal, but to some sort of incapacity arising from nervousness, hysteria, or unconquerable aversion; all of which, I think, are insufficient to enable the case to be considered as one of mere wilful refusal, and compel me to give a decree."

In the present case it is not clear that the parents of the lady controlled her conduct at the last, whatever they may have done in the earlier stages, after the ceremony of marriage became known to them. In her letter written on July 5, 1911, she does not refer to her parents at all, and she refuses in that letter unequivocally.

Under these circumstances I think I can release these two young people from a tie which neither of them wishes to be bound by. I can hold that the refusal by the respondent,

(1) (1896) 75 L. T. 192. (2) (1878) 3 P. D. 72.
(3) 27 Times L. R. 421.

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coupled with the statement that she will not take medical advice, and with the fact that she declined to be medically examined pursuant to the order of this Court, entitles me to infer that some impediment exists pointing to incapacity on her part to fulfil the obligations of a wife, whatever that impediment or incapacity may be.

As I have said, I do not consider that the law applicable to these cases, as hitherto laid down, is very satisfactory, because the Court has to act upon something very like a legal fiction. I pronounce the decree asked for.

Solicitors for petitioner: *McKenna & Co.*
Solicitors for respondent: *Lewis & Lewis.*

H. D. G.

1912

Jan. 15.

KEMP-WELCH *v.* KEMP-WELCH and CRYMES.

Divorce—Verdict, Judgment, and Decree—Motion by Co-respondent to set aside —Allegation of Fraud—Jurisdiction.

The Court has no jurisdiction on motion by a co-respondent to rescind a decree absolute on the ground that the decree and the verdict and judgment upon which the decree was founded were obtained by fraud.

This was a motion on behalf of the co-respondent.

The notice of motion and the case on motion were in the following terms:—

"Take notice that this honourable Court will be moved on Monday the 15th day of January, 1912, by counsel on behalf of the co-respondent, Charles Hambleton Crymes, for an order that the verdict of the special jury given in this matter on the 23rd day of February, 1911, and the judgment of this honourable Court entered in consequence thereof upon the said 23rd day of February, 1911, be annulled and set aside and further that the decree absolute pronounced herein upon the 6th day of September, 1911, be set aside and rescinded and annulled and that judgment be entered for the said co-respondent with costs, or in the alternative for such other order as to the Court shall seem meet on

the ground that the proceedings were not brought before the Court bona fide and that the petitioner practised a fraud upon the Court which induced the verdict given and the judgment entered and that the process of the Court has been abused."

"Case on behalf of Charles Hambleton Crymes, the co-respondent, to annul and set aside the verdict of the special jury given in this matter on the 23rd day of February, 1911, and the judgment of this honourable Court entered in consequence thereof on the said 23rd day of February, 1911, and to set aside, rescind, and annul the decree absolute pronounced herein upon the 6th day of September, 1911, and to enter judgment for the co-respondent with costs.

"1. This is a suit for dissolution of marriage brought by John Stenhouse Kemp-Welch against his wife Irma Kemp-Welch on the ground of her adultery with Charles Hambleton Crymes.

"2. The petition herein was filed upon the 29th day of December, 1908, and answered by the co-respondent on the 3rd day of March, 1909.

"3. This petition was heard by this honourable Court and a special jury upon the 23rd, 24th, 25th, and 26th days of November, and the 1st, 2nd, and 3rd days of December, 1909, and resulted in a disagreement of the jury upon the issues of adultery and their discharge without giving a verdict upon those issues.

"4. During this hearing of the petition the respondent and co-respondent upon oath denied the accusation of adultery made against them.

"5. The petition again came to be heard by this honourable Court with a special jury upon the 17th, 21st, 22nd, and 23rd days of February, 1911.

"6. At this hearing the respondent was not represented and did not appear, and the jury returned a verdict that the respondent and co-respondent had been guilty of adultery whereupon judgment was entered pronouncing a decree nisi in favour of the petitioner.

"7. The decree absolute was pronounced upon the 6th day of September, 1911.

"8. During the hearing referred to in paragraphs 5 and 6 hereof a letter was produced and put in evidence by the

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petitioner alleged to be a confession of guilt made by the respondent, and this could not fail to influence the Court and jury. Certain other letters were produced which, together with the alleged confession, are exhibited to the affidavit of Ernest Salaman filed herewith and it was contended on behalf of the co-respondent but denied by the petitioner that such letters shewed an agreement that the petitioner would take his wife, the respondent, back to himself and her children if she would make a confession of adultery with the co-respondent.

"9. In fulfilment of the agreement, which it was suggested on behalf of the co-respondent was made by such letters, the respondent has since the decree herein has been made absolute returned to the petitioner, and is now living with him and his children in Canada."

Barnard, K.C. (*W. O. Willis* with him), for the petitioner, referred to the notice of motion and took the preliminary objection that this Court had no jurisdiction to entertain the application.

If it can be made at all, it must be to the Court of Appeal, under the Judicature Act, 1890, s. 1. (1)

The respondent and co-respondent were not entitled to shew cause against the decree nisi being made absolute: *Stoate* v. *Stoate*. (2)

The co-respondent had no right of appeal against the decree absolute in this case: Judicature Act, 1881, s. 10. (3)

The only other point suggested in the notice and case on motion is fraud, and that must be raised in an action; it cannot be considered on motion: *Ainsworth* v. *Wilding*. (4)

Sir Edward Clarke, K.C., and *Percival Clarke* (*Lord R. Cecil, K.C.*, and *Theobald Mathew* with them), for the co-respondent. The notice of motion was drawn in its present form to avoid the risk of the Court of Appeal referring the case back to this Court.

If the application to set aside the verdict and judgment had gone on to ask for a new trial, it might be contended that the

(1) 53 & 54 Vict. c. 44.
(2) (1861) 2 Sw. & Tr. 384.
(3) 44 & 45 Vict. c. 68.
(4) [1896] 1 Ch. 673.

applicant ought to seek relief in the Court of Appeal ; but it asks this Court to set aside, rescind, and annul the decree absolute on the ground of fraud ; and any Court which has been induced by fraud to make a decree has jurisdiction to set aside that decree : *Shedden* v. *Patrick*. (1)

If a judgment obtained by fraud can be treated as a nullity, then a fortiori the applicant is entitled to apply to the Court where that judgment was obtained and to ask this Court to remove from its records the decree and judgment so obtained.

The notice of motion proceeds to ask this Court to make such order as it may think fit, on the ground that there was fraud in the proceedings before it. This would, it is apprehended, prevent any further proceedings that might be taken upon the judgment so obtained. Proceedings are being taken to enforce the damages and costs.

Barnard, *K.C.* (in reply on the preliminary objection). *Shedden* v. *Patrick* (1) proceeded upon the ground that there were no real parties before the Court, and no real judgment. Therefore that case does not affect the judgment of Romer L.J. in *Ainsworth* v. *Wilding*. (2)

[SIR SAMUEL EVANS, PRESIDENT. Unless you insist upon a decision first upon the preliminary point I think I had better hear the motion. I can deal with the preliminary point hereafter.]

[The motion was then proceeded with.]

SIR SAMUEL EVANS, PRESIDENT. This motion is misconceived. I am clearly of opinion that I have no jurisdiction to disturb the decree absolute which followed upon the verdict of the jury and the judgment which passed against the co-respondent.

If there is any method of getting rid of the decree after it has been made absolute it is not by motion in this Court.

Lest it may be said elsewhere that I am wrong in my view on the question of jurisdiction, I will now proceed to pronounce my opinion of the motion on its merits as if I had jurisdiction to entertain it.

[The learned President then proceeded to deal with the

(1) (1854) 1 Macq. 535. (2) [1896] 1 Ch. 673.

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affidavits and other evidence upon the motion and concluded as follows:—]

So far I can see, there is no foundation for the suggestion that there has been any fraud on the part of anybody in this case; and, having formed my opinion on the merits of the motion, I should dismiss this application with costs, even if I had jurisdiction to entertain the motion.

Solicitors for co-respondent: *Tilleards.*

Solicitors for petitioner: *Ernest Salaman & Co.*

H. D. G.

1912

Jan. 22; *Feb.* 5.

LORAINE *v.* LORAINE AND MURPHY.

Divorce—Settlement under the Divorce Act, 1857, *s.* 45, *and Variation of Settlement under the Divorce Act*, 1859, *s.* 5—*Will restraining Anticipation and Alienation—Forfeiture—Jurisdiction to override Clauses in Will.*

The Court has power to order a guilty respondent to make a settlement of property derived under a will which contains clauses against anticipation and for forfeiture on alienation; and compliance with such an order does not render the respondent liable to the forfeiture which would take place if the alienation were voluntary.

MOTION upon the registrar's report as to an application for a settlement under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, and to vary a settlement under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5.

The husband, the petitioner, obtained a decree absolute dissolving his marriage on May 10, 1911. There was one child only issue of the marriage, a son born on May 4, 1899.

The respondent had married the co-respondent since the service of the petition for a settlement. Under an indenture of settlement made in 1873, in contemplation of the marriage of the respondent's parents, the respondent had become absolutely entitled to a reversionary interest in 3000*l.* falling in on the death of her mother.

Under the will of her father, the respondent, on the death of her mother, would be entitled to a life interest in a sum, together

with her interest under the above-mentioned indenture of settlement, of 30,000*l.*, held in trust for her without power of anticipation, and with a clause against alienation as in the will mentioned.

The clause in the will against alienation was in these terms: "And I do hereby declare that if any of my children shall alienate, charge, sell, or part with, or attempt to alienate, charge, sell, or part with, his, her, or their prospective interests under this my will, whether absolute, contingent, in reversion, expectancy or otherwise vested in him, her, or them, so that his her or their shares would vest in some other person or persons or company, then and in such case such child or children shall forfeit all his her or their interest under this my will as absolutely as if he she or they had predeceased me leaving no issue or been expressly excluded from all participation in my said estate under this my will."

By a deed of appointment made in 1903, a sum of 5000*l.* out of the 30,000*l.* was appointed by the respondent, subject to her own life interest, in trust for the child of the marriage; and a further sum of 10,000*l.* was appointed by the respondent, on similar terms, by a deed of appointment made in 1908.

The respondent objected to anything in the nature of a forfeiture of her interest under the will.

The registrar reported that, having regard to the case of *Constantinidi* v. *Constantinidi and Lance* (1), in which it was decided that the service of the petition for variation of settlements created a lis pendens and that the subsequent marriage of the respondent did not diminish the power of the Court over the funds of a settlement, and also having regard to the case of *Milne* v. *Milne and Fowler* (2), in which an order was made by the Court directing application by the trustees of a will for the benefit of the husband of income to which the wife was entitled with an alienation clause, he recommended that the Court should order that upon the death of the respondent's mother the trustees of the will of the respondent's father should pay two-fifths of the income from the fund of 30,000*l.*, derived by the respondent under the said will and the said indenture of

(1) [1904] P. 306. (2) (1871) L. R. 2 P. & M. 295.

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settlement, to the petitioner during the joint lives of the petitioner and respondent, and, in the event of the death of the petitioner during the life of the respondent, should order that the said trustees should pay one-third of the said income, during the minority of the said child, to any guardian whom the petitioner should appoint, or, in default of appointment by him of any guardian, to any guardian whom the trustees should select, until the said child should complete his education at school or the university, or should pass into the Navy, and thereupon that the said trustees should during the respondent's lifetime pay one-fourth of the said income to the said child.

Le Bas, for the petitioner. Subject to a variation which has been agreed upon as to the provision of costs, as between solicitor and client, out of the settled funds, the petitioner moves to confirm the report. The order, if made, will not effect an alienation within the terms of the will of the respondent's father.

Talbot-Ponsonby, for the respondent. *Churchward* v. *Churchward* (1) does not apply. The restraint on anticipation still attaches. This Court can vary a settlement; it cannot alter the terms of a will. The order suggested cannot be made. The Court has no jurisdiction to vary the terms of the will of the respondent's father. As to the 3000*l.*, the registrar is perfectly right.

MacConkey (*J. W. Ross Brown* with him), for the trustees. The real point, so far as the trustees are concerned, is whether *Churchward* v. *Churchward* (1) covers this case, and whether *Constantinidi* v. *Constantinidi and Lance* (2) applies.

Le Bas, in reply, referred to *Lorriman* v. *Lorriman and Clair*. (3) The 3000*l.* passes under the settlement. The whole 30,000*l.*, which includes the 3000*l.* although this is earmarked, comes under the will of the respondent's father. [He referred to *In re Beaumont, Woods* v. *Beaumont* (4), and *Lear* v. *Leggett*. (5)] The clauses in the Acts must be construed strictly:

(1) [1910] P. 195.
(2) [1904] P. 306.
(3) [1908] P. 282.
(4) [1910] W. N. 181.
(5) (1829) 2 Sim. 479; (1830) 1 Russ. & My. 690.

Jarman on Wills, 6th ed., vol. 2, 1506. In *Dommett* v. *Bedford* (1), the words were much stronger than in the present case. The question as to restraint on anticipation was disposed of in *Churchward* v. *Churchward*. (2) There was no restraint on anticipation in the present case at the time when the lis pendens came into existence. *Lorriman* v. *Lorriman and Clair* (3) was a case under s. 45 of the Act of 1857 (20 & 21 Vict. c. 85), and Bucknill J. held that the procedure was the same as under s. 5 of the Act of 1859 (22 & 23 Vict. c. 61).

Feb. 5. SIR SAMUEL EVANS, PRESIDENT. This case comes before the Court upon a motion to confirm the registrar's report dealing with the question of what settlements should be ordered of a guilty wife's property.

A decree nisi for the dissolution of the marriage was pronounced against the wife on November 7, 1910, on the ground of her adultery. This decree was made absolute on May 10, 1911.

The petition for a settlement of the wife's property was filed on May 29, 1911, and was served on June 3, 1911.

The wife married again on June 4, 1911.

The property to be dealt with is a reversionary interest, to which the wife is entitled under the will of her father, in a fund of 30,000*l*.

In the will there are two clauses affecting this property which have to be considered, namely, (1.) a clause providing for forfeiture on alienation, and (2.) a clause in restraint of anticipation.

As to the former clause, it was contended that, if a settlement were ordered, the wife's interest would be forfeited, and that, therefore, there would be nothing to settle. I do not think so. On the contrary, I think it is clear, by the terms of the clause, that the forfeiture would only take place upon a voluntary alienation, and that an order by this Court for a settlement would not cause a forfeiture. But the persons who would be entitled by virtue of the gift over upon alienation are not, and could not be, before the Court on this motion; and if they think

(1) (1796) 6 T. R. 684; 3 Ves. 149. (2) [1910] P. 195.
(3) [1908] P. 282.

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that they are entitled under the forfeiture clause, they are not bound by my decision. It is open to them to take such steps elsewhere as they may be advised in order to secure any rights which may be theirs.

As to the latter clause, it was contended that this Court could not order any settlement of the property by reason of the clause restraining the wife from anticipation.

The settlement is asked for under s. 45 of the Matrimonial Causes Act, 1857 (1), for the benefit of the innocent husband and a child of the marriage.

It was argued that a settlement could not be ordered, because the property came to the wife under a will, and, that to order a settlement would be to alter or vary the will.

This is a misconception. The application is not to vary a will, but to order a settlement of property devolving under it.

Norris v. *Norris and Gyles* (2) decided that, under s. 45 of the Matrimonial Causes Act, 1857, marriage settlements could not be interfered with: see *Michell* v. *Michell.* (3) In order to remedy this, the subsequent Act of 1859 (4) was passed, and s. 5 provided that marriage settlements, ante-nuptial or post-nuptial, could be varied, where decrees for nullity or dissolution of marriage were pronounced. Clauses in restraint of anticipation in such settlements do not prevent the Court making orders for resettlement of the property: *Constantinidi* v. *Constantinidi and Lance* (5); *Churchward* v. *Churchward.* (6)

It would be a curious state of the law if this Court could deal with property settled by marriage settlements notwithstanding a restraint on anticipation, and could not deal with property coming to one of the parties under a will containing a similar restraint.

I am clearly of opinion that the Court can order a settlement of the property devolving upon the wife by will in the present case, notwithstanding the restraining clause. An instance of such an order is to be found in the case of *Milne* v. *Milne and Fowler.* (7)

(1) 20 & 21 Vict. c. 85.
(2) (1858) 1 Sw. & Tr. 174.
(3) [1891] P. 208.
(4) 22 & 23 Vict. c. 61.
(5) [1904] P. 306.
(6) [1910] P. 195.
(7) L. R. 2 P. & M. 295.

The dissolution of the marriage in the case now before the Court caused a discoverture. During the period of discoverture the restraint against anticipation did not attach. The petition for settlement was filed during this period and constituted a lis pendens. Even if it had been filed before the decree for dissolution was made absolute, the position could not be affected by a subsequent remarriage: *Constantinidi* v. *Constantinidi and Lance.* (1)

The objections raised to the registrar's report are therefore overruled, and the report is confirmed, subject to certain amendments in detail, which do not affect the principle.

Solicitors for petitioner: *Van Sandau & Co., for Wright & Co., Liverpool.*

Solicitors for respondent: *May, Sykes & Co., for C. H. Close, Leeds.*

Solicitors for trustees: *Evans, Lockett & Co., Liverpool.*

(1) [1904] P. 306.

NOTE BY SIR SAMUEL EVANS, PRESIDENT.—I take this opportunity of mentioning that in the report of *Churchward* v. *Churchward*, [1910] P. 195, by a clerical or printer's error the word "vary" in the fifth line from the bottom of p. 197 has been printed by mistake. It should be "order."

H. D. G.

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Dec. 11, 21.

STATHAM *v.* STATHAM AND HIS HIGHNESS THE GAEKWAR OF BARODA.

Divorce—Petition—Co-respondent—International Law—Foreign Sovereign—Privilege—Proof of Status—Certificate of Secretary of State.

A foreign ruling prince is not capable of being made a co-respondent in a suit for divorce in the High Court of Justice in England; and, where such a prince had been named as a co-respondent in a petition, his name was, on proof of his status, ordered to be struck out.

A certificate from the India Office was accepted as evidence of the status of the person in question, following the principle laid down in *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149.

THESE were two applications arising out of a husband's divorce petition.

The first of these applications was a motion by the petitioner to dispense with personal service of the citation and sealed copy of the petition on the co-respondent.

The second application was a summons in chambers (adjourned into Court to be argued with the motion) by the co-respondent asking that he should be dismissed from the suit on the ground that he was an independent ruling prince, and further that the citation should be called in and declared null and void.

The material facts were as follows:—

The co-respondent, who was charged in the petition with adultery with the respondent in Scotland, was in England at the time the petition was filed, and on October 18, 1911, a clerk of the petitioner's solicitors went to the hotel, where the co-respondent was staying, for the purpose of serving him, but was not allowed to see the co-respondent, and was referred by the co-respondent's secretary to his (the co-respondent's) solicitors. Before any arrangements for service could be made the co-respondent left England and returned to India.

Bayford, for the petitioner. The co-respondent relies, apparently, on the case of *Mighell* v. *Sultan of Johore* (1), but

(1) [1894] 1 Q. B. 149.

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that case is distinguishable. Accepting it to the fullest extent, it is in favour of the petitioner. That was a case of alliance; this is a case of suzerainty and dependence. The co-respondent is not a ruling prince of an independent State.

[He also referred to *Rayment* v. *Rayment and Stuart; Chapman* v. *Chapman and Buist.* (1)]

W. O. Willis, for the co-respondent. The co-respondent is a foreign ruling prince, and, as such, was not even obliged to enter an appearance under protest. *Mighell* v. *Sultan of Johore* (2) governs this case.

The concluding portion of the judgment in *Rayment* v. *Rayment and Stuart; Chapman* v. *Chapman and Buist* (1) shews that the decision in those cases is not an authority in favour of the present petitioner.

[Bargrave Deane J. I think the sole question here is whether the person named is an independent reigning prince.]

Bayford, in reply. The onus is on the co-respondent to shew that he ought not to have been made a party to the proceedings. He has not discharged that onus, and an order for substituted service on the solicitors should be made.

Cur. adv. vult.

1911. Dec. 21. Bargrave Deane J. In this case Mr. George Wellington Statham has filed a petition praying the Court to dissolve his marriage on the ground of the adultery of his wife, Beatrix Alice Statham, with his Highness Maharaja Gaekwar Sir Saraji Rao III. of Baroda, who has been added as a co-respondent in the suit under s. 28 of the Divorce Act, 1857.

The first question which I have to determine is raised by summons on behalf of the co-respondent, in which the Court is asked to dismiss him from the suit on the ground that he is a reigning sovereign and by the rules of international law is not amenable to the jurisdiction of this Court.

The second question is the subject of a motion for leave to serve the co-respondent by substituted service, as it has been

(1) [1910] P. 271. (2) [1894] 1 Q. B. 149.

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found impossible to personally serve the petition and citation upon him. This would follow almost as a matter of course if I were to find against the contention of his Highness raised on the summons.

There is no doubt that an independent reigning sovereign cannot by the rules of international law be made against his will a party to proceedings in our Courts. He may choose to sue, and if so a counter-claim may be raised against him as plaintiff, but he cannot be made a defendant.

What then is the status of the Gaekwar of Baroda?

So far as I have been able to ascertain by my researches the princes of Baroda date their importance from the Mahratta Confederacy, which in the eighteenth century was a powerful body of confederated ruling chiefs in India. During the last thirty-two years of the eighteenth century the house of Baroda fell a prey to family feuds, and in 1800 the succession fell to a prince feeble in mind. Internal troubles arising, British troops were sent in defence of the hereditary ruler against all claimants, and in 1802 a treaty was signed by which the independence of the reigning prince of all except the British Crown was assured, but which, on the other hand, secured his dependence on the British Crown. Several weak but troublesome princes succeeded in succession to the throne of Baroda, and in 1874 the then reigning Gaekwar was by order of the British Government brought to trial on a charge of attempting to poison the British resident at his court. The trial was conducted before a mixed commission of eminent British officers and natives of the highest rank. A unanimous verdict was not obtained, and in the result, the then Viceroy of India, Lord Northbrook, deposed the Gaekwar and appointed another member of the royal house of Baroda to reign in his place.

In October, 1911, an action was brought in the King's Bench Division of the High Court in England by one Ernest Emmanuel against the present reigning Gaekwar, and Lush J., upon hearing counsel for both sides and having obtained a certificate from the India Office as to the status of the Gaekwar of Baroda, ordered that the writ in the action be set aside and all proceedings stayed on the ground that the defendant was an independent

sovereign and not a subject of His Majesty the King. The certificate from the India Office is as follows :—

India Office Certificate.

"The Gaekwar of Baroda has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, section 18, sub-sec. 5, as that of native princes or chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat his Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.

"But, though his Highness is thus not independent, he exercises as ruler of his State various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the ruling chief of Baroda, subject, however, to the suzerainty of His Majesty the King of England and to the exercise by the Government of India of such of the rights and powers of territorial sovereignty as have by treaty, usage, or otherwise passed to and are exercised by the suzerain, such as, for instance, the exercise of jurisdiction over Europeans and Americans in Baroda, of interference to settle disputes as to succession to the State or to put a stop to gross misrule in the State, or to regulate armaments and the strength of the military forces, &c."

What is the meaning of the word "suzerainty" and what are its essentials? Sir Courtenay Ilbert in his work on the Government of India gives a digest of statutory enactments relating to India, and in a supplemental part to that digest are contained definitions of expressions in the digest. He adopts the interpretations given in the Interpretation Act, 1889, and the Indian General Clauses Act, 1897, and in a note says the expression "suzerainty" is substituted by the Interpretation Act for the older expression "alliance" as indicating more accurately the relation between the rulers of these States and the British Crown as the paramount authority throughout India.

Thus "suzerainty" is a term applied to certain international

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relations between two sovereign States whereby one, whilst retaining a more or less limited sovereignty, acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief, or conventional, i.e., by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction.

Grotius (De Jure Belli ac Pacis) says unequal leagues are made not only between the conquerors and the conquered, but also between peoples of unequal power, even such as never were at war with one another. Grotius, Pufendorf, and Vattel agree that in unequal alliances the inferior power remains a sovereign State. Its subjects or citizens own allegiance only to their own sovereign. Over their disputes and internal dissensions the suzerain power as such has no jurisdiction. In short, the weaker power may exercise the rights of sovereignty so long as by so doing no detriment is caused to the interests or influence of the suzerain power. It follows that the inferior power must in all alliances with other States be controlled by its suzerain. Vattel says a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection, without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations.

In my opinion this aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office, and it follows that his Highness by international law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England, and his name must be struck out as a co-respondent. I, however, give leave to the petitioner to proceed without making any co-respondent as to those paragraphs of the petition in which his Highness's name appears.

Solicitors for petitioner: *Faithfull & Owen.*

Solicitors for the person named as co-respondent: *Horne & Birkett.*

H. D. G

In the Estate of CECILIA LONG-SUTTON.

1912
Feb. 12.

Probate—Practice—Motion for Presumption of Death—Uncertainty as to Date of Death—Form of Oath to lead Grant.

The dead body of a lady who had disappeared on December 23, 1909, was found in a river on the 29th of the same month. Upon a motion for presumption of death, the Court made no order on the motion, intimating at the same time that, upon the applicant swearing that the deceased died on December 23 or 29, 1909, or on some day between those dates, a grant would be made in the Probate Registry.

This was a motion for presumption of death, the form of the application being for an order giving leave to the applicant to swear the death of Cecilia Long-Sutton as having occurred between December 23, 1909, and December 29, 1909.

It appeared from the affidavits and motion paper that Cecilia Long-Sutton was in December, 1909, living in apartments at Coronation Villas, Llandrindod Wells, in the county of Radnor, in Wales. On December 23, 1909, she informed her landlady, Miss Reeves, that she was leaving and that her luggage would be sent for. Having paid her bill, she left the apartments about 11 o'clock in the forenoon, carrying in her hand nothing but an umbrella, and walking along the road in the direction of Knighton and Bucknell.

On December 29, 1909, the body of a woman was found in the river Teme at Leintwardine, in Herefordshire, adjoining the parish of Bucknell. An inquest was held and a verdict of "found drowned" was returned, the body being afterwards interred in Bucknell churchyard as that of an unknown woman. A portion of the clothing as well as a bunch of four keys were retained by the police, and by means of these and other belongings of the deceased which had remained in the possession of Miss Reeves, her landlady, the deceased had recently been identified in consequence of inquiries, instituted in the autumn of 1911, by a sister of the deceased, with the assistance of her family solicitors. A will had been prepared by the said solicitors and executed by the deceased in March, 1906, whereby she appointed one of her sisters, the present applicant, her sole

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executrix, and left her property to the British and Foreign Bible Society. Her estate was said to consist of about 14,000*l.* in personalty and about 350*l.* in realty.

W. O. Willis, for the applicant, in support of the motion.

SIR SAMUEL EVANS, PRESIDENT. In this case the grant could have been obtained in the registry on swearing that the deceased is dead, and that she died between December 23 and 29, 1909. I think, in strictness, that the oath should be that the deceased died on December 23 or 29, 1909, or on some day between those dates. I make no order on this application. (1)

Solicitor: *Richard Preston, for Preston & Son, Norwich.*

(1) An order was drawn up in the following terms:—

"On reading the statement filed on behalf of the applicant and the affidavits of Mary Reeves (with exhibit), George Lee (with exhibit), William Thomas, Magdalena Long-Sutton, Arthur Waters Preston, and Beatrice Jane Long-Sutton, sworn respectively 23rd, 24th, 25th, and 26th days of January, 1912, and on hearing counsel thereon, no order is required upon an application for probate of the will of Cecilia Long-Sutton deceased if it be sworn in the oath to lead the grant that the testatrix died on or between the 23rd and 29th days of December, 1909."

H. D. G.

THE RIGEL.

1912
Feb. 5, 19.

Admiralty—Ship—Collision—Damage—Personal Injury—Shock—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

The plaintiffs, owners of a lightship stationed off the coast of Ireland, brought an action in rem, for damage by collision, against the defendants, owners of a sailing ship, which, during a fog, ran into the lightship. The defendants admitted liability for the damage sustained by the plaintiffs, except as to a claim for an indemnity in respect of a sum for which the plaintiffs had been held liable by reason of an award, under the Workmen's Compensation Act, 1906, making a weekly allowance, during incapacity, in favour of a seaman acting as cook and gunner on board the lightship at the time of the collision, and who, it was alleged, was suffering from shock due to fright caused by seeing the defendants' vessel looming out of the fog and bearing down upon the lightship:—

Held by Bargrave Deane J., confirming the report of the admiralty registrar, that, apart from technical objections arising from want of due notice, the damage was not "done by any ship" within the meaning of s. 7 of the Admiralty Court Act, 1861, and, therefore, as against the defendants, the owners of the sailing ship, the claim was too remote.

Petition, by the plaintiffs, the Commissioners of Irish Lights, owners of the lightship *Petrel*, in objection to the report of the admiralty registrar disallowing, on the ground of remoteness, a claim against the defendants, the owners of the German sailing ship *Rigel*, for an indemnity in respect of personal injury alleged to have been sustained by one of the commissioners' servants by reason of a collision between the two vessels.

On August 5, 1910, James Keating, employed from August 1 to 29 as a temporary seaman (cook and gunner) on board the *Petrel*, stationed off the South Rock, on the coast of county Down, Ireland, was keeping watch from 4 to 8 A.M., when, according to an affidavit filed by him, "a very heavy fog prevailed and I was engaged in firing the lightship's fog signal. Shortly before 8 A.M. a tug boat appeared out of the fog on our starboard beam, about half a cable's length away, and almost immediately afterwards I saw a large ship coming down on us about one point on our starboard bow and a quarter of a cable's length away. The said ship, which I afterwards ascertained to be the *Rigel*, struck the lightship's stem, and subsequently struck a glancing blow on her

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starboard bow. When I saw the *Rigel* approaching I was very much frightened, as I thought the lightship was about to be sunk by the collision, and I suffered a severe shock and fright by reason thereof."

On August 9, the plaintiffs, as owners of the lightship *Petrel*, commenced an action in rem, claiming against the defendants' ship *Rigel* for damage by collision. On October 31, the defendants admitted liability "for the damages the subject-matter of action" and prayed "a reference to the registrar and merchants to assess the amount thereof." On November 17, the "particulars of the damages claimed on behalf of the owners of the South Rock lightship *Petrel*" were filed, consisting of twenty items and amounting to 365*l.* 19*s.* 5*d.* The several items were admitted or agreed, except item 21, which ran: "The plaintiffs also claim an indemnity against the defendants for any sum for which they may be liable in respect of injury alleged to have been sustained by one James Keating, a seaman employed on board the lightship *Petrel* at the time of the collision, the subject-matter of this action, by reason of the said collision."

On March 31, 1911, an application for arbitration under the Workmen's Compensation Act, 1906, between James Keating, of High Street, Portaferry, in the county of Down, seaman, and the Commissioners of Irish Lights, having an office at Dublin in the county of the city of Dublin, was filed in the county court of Down, and at the hearing, according to the learned county court judge's notes, it was contended, inter alia, on behalf of the respondents (the owners of the lightship *Petrel*), that no notice of the accident had been served, and as the want of notice was not occasioned by mistake, absence from the United Kingdom, or other reasonable cause, and the respondents were clearly prejudiced by not having received notice, the application should be dismissed: Workmen's Compensation Act, 1906, ss. 2 and 7.

On behalf of the applicant, it was argued, contra, that the *Petrel* was a ship, and that as the accident happened, and the incapacity commenced, on board the ship, no notice was necessary.

In reply it was contended, on behalf of the respondents, that the *Petrel* was not a ship, and reference was made to the Merchant

Shipping Act, 1894, s. 742, and the following authorities were cited: *Ex parte Ferguson and Hutchinson* (1); *The Mac.* (2)

In the result, the learned county court judge adopted the view, on the medical question, of the medical referee (Dr. Tate), whose report, dated May 13, so far as material was as follows:—

"1.—The said James Keating is in my opinion now partially incapacitated, he would be unfit for the more responsible duties of a seaman, such as keeping watch alone, or climbing a mast.

"2.—In my opinion he is suffering from neurasthenia (or in simpler language from a nervous breakdown). This condition could be caused by a fright such as he describes.

"3.—I believe his incapacity to be of a temporary nature.

"4.—In my opinion his incapacity commenced gradually from the date of the fright while on board the lightship increasing slowly but steadily, the stimulus of responsibility keeping him up, and when this ceased to act at the expiration of his work he collapsed.

"5.—In my opinion he could do light work such as digging in a garden and after a time, say two months, when his general health had improved, he should again be able to resume his work as a seaman.

"6.—I could find no evidence of organic disease in this man's nervous system but there are present distinct signs of a temporary and functional disturbance of that controlling balance of the nervous system which is essential to a healthy bodily state. His thoughts are filled with forebodings of the future. His general health is low, but this condition is undoubtedly aggravated by the insufficient food he has been living on. He says he has not been able to provide himself with anything but the barest necessities. I think work is essential for his recovery, at first of course it must be of a light nature until by gradual exercise his bodily strength has increased. I believe after about two months' light work he should be able to resume his ordinary duties as a seaman."

The award of the county court judge, dated June 16, 1911, was in the following terms:—

"1.—I order that the respondents the Commissioners of Irish

(1) (1871) L. R. 6 Q. B. 280. (2) (1882) 7 P. D. 126.

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Lights do pay to the applicant James Keating the weekly sum of 12*s.* 3*d.* as compensation for personal injury caused to the said James Keating on the 5th day of August 1910 by accident arising out of and in the course of his employment as a seaman employed by the said respondents. And it appearing that the applicant had been paid full wages up to the 31st day of August 1910 I further order that such weekly payment shall commence as from the said 31st day of August 1910 and shall continue during the total or partial incapacity of the said James Keating for work or until the same shall be ended diminished increased or redeemed in accordance with the provisions of the above-mentioned Act.

"2.—And I do order that the said Commissioners of Irish Lights do forthwith pay to the said James Keating the sum of 25*l.* 2*s.* 3*d.* being the amount of such weekly payments calculated from the 31st August 1910 until the 14th day of June 1911 and do thereafter pay the said sum of 12*s.* 3*d.* per week to the said James Keating on Wednesday in every week.

"3.—And I order that the said Commissioners of Irish Lights do pay to the clerk of the peace for the county of Down for the use of the applicant his costs of and incident to this arbitration and witnesses' expenses in default of agreement between the parties as to the amount thereof to be taxed by the clerk of the peace within fourteen days from the certificate of the result of such taxation."

The material portion of the report of the learned admiralty registrar, dated November 6, 1911, and to which objection was now taken, ran as follows:—

"Whereas the defendants (the owners of the sailing ship *Rigel*) have admitted their liability for the damages occasioned to the plaintiffs (the Commissioners of Irish Lights) by reason of the collision in question in this action, subject however to a reference to the registrar assisted by merchants to assess the amount thereof.

"Now I do hereby report that the said claim was agreed between the parties with the exception of item No. 21 a claim for an indemnity for personal injury which came before me on the 29th March and 31st October 1911."

[The registrar then dealt with the facts already set out, and continued :]

"The conclusion to which I have come is that the defendants are not liable in this action. The claim is for damage by collision. Counsel for the plaintiffs argued that the real ground of action was negligent navigation, of which the contact of the two ships was a result. This is in a sense true, but the negligent navigation does not give the plaintiffs any ground of action until and unless they or their property are injured. It is not proved that the actual collision caused the nervous shock to Keating—rather it was the approach of the *Rigel*, but in either event, the claim is I think too remote.

"It is, I think, clearly now the law that a person may recover from another person guilty of negligence damages resulting from a nervous shock unaccompanied by any actual impact: *Dulieu* v. *White & Sons* (1); but this general proposition has a qualification which is stated in the above case. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C.

"The fear which Keating had in the first place was injury to the lightship by the *Rigel*, as soon as the collision took place ; but it was nothing more than a grazing blow which could not injure Keating. It is impossible to say that as a seaman there was a reasonable fear of personal injury such as existed in the mind of the plaintiff in *Dulieu* v. *White*. (1) Keating has however recovered compensation under the Workmen's Compensation Act, 1906, for injury in the course of his employment; but this fact does not thereby enable the plaintiffs to recover damages from the defendants in this action, since the obtaining of the compensation results solely from the provisions of a special statute, and the case of *The Circe* (2) would apply. It was argued on behalf of the plaintiffs that *The Annie* (3) governed the present case; but from the statement of counsel it appears that *The Annie* (3)

(1) [1901] 2 K. B. 669. (2) [1906] P. 1, at p. 13.
(3) [1909] P. 176.

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was a case under s. 6 of the Workmen's Compensation Act, 1906, and it is admitted in the present case that the formalities necessary to make that section applicable have not been complied with.

"There is also a further point which is adverse to the plaintiffs. Their action is for damage done by a ship (Admiralty Court Act, 1861, s. 7), that is by a ship as the noxious instrument: see *The Vera Cruz*. (1) Under the circumstances already stated, I am of opinion that this claim is not one in respect of damage done by a ship: it is one which must be distinguished from an action by Keating himself against the owners of the *Rigel* for negligent navigation, whereby he suffered a nervous shock causing physical injury. Stating the result of the previous opinions shortly, the conclusion is that in order to enable the owners of a ship who have paid compensation under the Workmen's Compensation Act, 1906, to recover against the owners of the wrong-doing ship, if they can recover at all except under the provisions of s. 6, the claim must either be one for damage done by the wrong-doing ship, and not excluded by the rules as to remoteness of damage, irrespective of the fact of a payment under the statute, or it must be a proper claim for indemnity under the statute as in *The Annie* (2), in which case also it might perhaps be said that there was actual damage by a ship. The present case does not fall under either of these heads, and therefore this particular claim must be disallowed.

"I have referred above to the case of *The Circe*. (3) After a careful perusal of Lord Gorell's judgment, I think that it is an authority that a payment under the Workmen's Compensation Act cannot be recovered as part of the damages suffered by the owners of an innocent ship against the owners of a wrong-doing ship. Since the decision in *The Dupleix* (4) it appears to me immaterial whether the action in which the claim is made be one in rem or in personam, and, if there is a conflict between *The Circe* (3) and *The Annie* (2), I must follow the reasoned judgment of Lord Gorell in the former case. Apart therefore from the

(1) (No. 2) (1884) 9 P. D. 96; 10 App. Cas. 59.
(2) [1909] P. 176.
(3) [1906] P. 1.
(4) [1912] P. 8.

opinions I have already expressed, the view I take of *The Circe* (1) would be sufficient to exclude this claim.

"Having regard to the above opinion, it is unnecessary for me to give a decision on the various other points which were argued before me, some of which may also well form a bar to this claim.

"I was asked to assess the damages irrespective of any decision to which I might come on the point of law. As however the claim is not even yet accurately formulated, it is undesirable that I should do so at this period, as the claim, if it should in future be desirable to assess it, can be more accurately and without expense assessed at a later date.

"Having regard to the above decision the defendants are entitled to the costs of the reference since the date of payment to the plaintiffs of the undisputed items of the claim."

1912. Feb. 5. *Bateson, K.C.*, and *R. H. Balloch*, for the petitioners (plaintiffs), the Commissioners of Irish Lights, owners of the *Petrel*, in objection to the registrar's report.

Laing, K.C., and *C. Robertson Dunlop*, for the defendants, the owners of the *Rigel*, contra.

The arguments of counsel sufficiently appear from the judgment. In addition to the cases already mentioned, the following were referred to:—*The Port Victoria* (2); *The Frankland* (3); *The Dictator* (4); *The Gemma* (5); *The Theta* (6); *Cory & Son, Ld.* v. *France, Fenwick & Co.* (7); *The Zeta.* (8)

Feb. 19. BARGRAVE DEANE J. This is an appeal from a report of the registrar on a reference, in which he refused to allow a claim by the Commissioners of Irish Lights, as owners of the lightship *Petrel*, to include as damages occasioned by a collision between the *Petrel* and the defendants' vessel *Rigel* an award made by the judge of the Newtownards County Court, county Down, in Ireland, in favour of one James Keating, under the provisions of the Workmen's Compensation Act, 1906.

(1) [1906] P. 1.
(2) [1902] P. 25.
(3) [1901] P. 161.
(4) [1892] P. 304.
(5) [1899] P. 285.
(6) [1894] P. 280.
(7) [1911] 1 K. B. 114.
(8) [1893] A. C. 468, at p. 478.

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On August 5, 1910, the *Petrel* was stationed on what is known as the South Rock station, off the coast of Ireland. On the morning of that day the defendants' vessel *Rigel* collided with the *Petrel*, causing some slight damage to her. It was a dense fog at the time, and James Keating, who was a member of the crew of the *Petrel*, serving as cook, and gun-firer, was on watch. Keating saw the *Rigel* approaching—looming through the fog. Keating was not knocked down or physically injured by the collision, but alleged that he was very much frightened when he saw the *Rigel* "coming on our port bow to sink us." The county court judge held that this fright so occasioned had caused a nervous breakdown, accepting the evidence of a medical witness, Dr. Tate, that he was temporarily quite incapacitated from his ordinary work as a seaman, and awarded him a weekly payment of 12*s.* 3*d.*, being the half of his weekly wages while in the commissioners' employment, to commence from August 31, 1910.

Keating had been engaged to serve on the *Petrel* from August 1 to August 29, in place of another man temporarily absent. He served to the end of his engagement, August 29, when in due course he was put ashore, and was paid full wages up to August 31. The master of the *Petrel* deposed that no complaint was made to him of any shock or injury by Keating, and the solicitor of the commissioners had no information till he received a letter from Keating's solicitor on October 18. The mate of the *Petrel* deposed that he had no complaint made to him by Keating at any time, and that if he had it was his duty to, and he would have, put it in the log. There is no such entry proved.

It is very difficult to believe that an experienced seaman, such as Keating was, could have been so seriously affected "by fright," or that he could have been so frightened, as to sustain a shock such as he described, and yet go on performing his duties on board from August 5 to August 29 without any complaint. I am not bound by the finding of the county court judge, and I have very grave doubts. I certainly should not, on the evidence, have felt that Keating had proved his case. But, assuming for the sake of argument that the judgment is right, and the commissioners have to pay, can they recover the amount

over from the owners of the *Rigel*? The registrar has reported that they cannot. Many reasons were given to me in support of the registrar's decision. Sect. 7 of the Admiralty Court Act, 1861, gives jurisdiction to the High Court of Admiralty "for damage done by any ship." In this case was damage done to Keating by the ship *Rigel*? His own story is that he was frightened, not by the collision, but before the collision took place, when he saw the *Rigel* looming out of the fog. Suppose that the *Rigel* had passed by, just avoiding a collision. Keating, according to his own account, would have had his fright all the same, but could it be then said to be damage caused by a ship? I do not think so, and in Keating's case as put it was his own nervousness which caused his fright, and, in my opinion, as a seaman, it is hardly credible that what he saw could have created such a fright in him as he describes. I am of opinion that his claim is too remote as against the owners of the *Rigel*.

I have not forgotten to notice the case of *Dulieu* v. *White* (1), but I agree with the words of the registrar in his report. It is impossible to say that, as a seaman, there was a reasonable fear of personal injury, such as existed in the mind of the plaintiff in *Dulieu* v. *White*. (1) But the further difficulty in the commissioners' way in seeking to recover from the owners of the *Rigel* the amount due to Keating under the county court award is a statutory one. Keating gave notice of his intention to proceed in the county court to get an award against the commissioners as his employers, under the Act, on November 4 and 8, 1910, and January 23, 1911, and on April 6, 1911, the commissioners' solicitors wrote to the *Rigel's* solicitors a letter containing the first intimation of Keating's claim. The answer was on April 10, repudiating any liability, and adding: "If your clients seek an indemnity from them, they must proceed strictly in accordance with the Acts and Rules governing such a case." Then followed the letter of April 10 from the commissioners' solicitors, but no notice was given by the commissioners' solicitors to the *Rigel's* solicitors pursuant to paragraphs 19—24 of the Rules under the Act (form 23), and the owners of the *Rigel* were, therefore, not represented at the county court, were not parties, and are not

(1) [1901] 2 K. B. 669.

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bound by the decision. It was also admitted in argument that the admission of liability in the admiralty action in rem was given before this question was put before the owners of the *Rigel*.

One point raised by counsel for the owners of the *Rigel* was that the *Petrel* was not a registered British ship under sub-s. 1 of s. 2 of the Merchant Shipping Act, and therefore not a British ship under sub-s. 2. It is agreed that she was not registered, although the county court judge was informed (wrongly) that she was; but was she a British ship? I think this question is not material, because in my opinion s. 2, sub-ss. 1 and 2, of the Merchant Shipping Act, 1894, only apply to the provisions of that Act, and for determining whether the *Petrel* was or was not a British ship or vessel we must look to the wording of s. 7 of the Workmen's Compensation Act, 1906—"Any other British ship or vessel of which the owner, or . . . . the managing owner or manager resides or has his principal place of business in the United Kingdom." Counsel for the owners of the *Rigel* further urged that Keating could not recover from the commissioners because he had failed to follow the provisions of sub-s. (*a*) of s. 7 of the Workmen's Compensation Act, 1906. I do not think the word "may" give notice is to be read "shall" give notice to the master; but, as I have already said, the fact that the man did not give any notice to the master, although he remained at his duties on board more than three weeks after his supposed shock, is a fact in the case of great weight. I confirm the registrar's report.

Solicitors for plaintiffs, the Commissioners of Irish Lights: *Williamson, Hill & Co., for Ingledew, Sons & Phillips, Swansea.*

Solicitors for defendants, the owners of the sailing ship *Rigel: Stokes & Stokes.*

T. L. M.

THE ROSALIA.

1912
Feb. 26, 27, 28.

Admiralty—Ship—Collision—Damage—Both to blame—Practice—Apportionment of Liability in proportion to the Degree of Fault—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1—*Costs.*

In an action of damage by collision between two steam vessels both were found to blame for navigating in a fog without proper regard to the regulations for preventing collisions at sea; but the initial fault—without which there would probably not have been any collision—arose from the neglect of those in charge of the defendants' vessel to obey the rule requiring them to stop their engines on hearing a whistle on their starboard bow:—

Held by Bargrave Deane J., that, in applying the provisions as to the division of loss, in cases of collision, contained in s. 1, sub-s. 1, of the Maritime Conventions Act, 1911, the justice of the case would be met by directing that the defendants' vessel should be liable for 60 per cent. of the damage sustained, leaving the plaintiffs' vessel liable for the remaining 40 per cent., with no order as to costs.

Action of Damage by Collision.

The plaintiffs were the owners of the British steamship *Woodmere*, and her master, officers, and crew suing for their lost effects. The defendants were the owners of the Italian steamship *Rosalia*.

On February 7, 1912, about 4 o'clock in the morning, during a dense fog, a collision occurred between the above-mentioned vessels in the North Sea some little distance south of the Would lightship. The *Woodmere* was a vessel of 682 tons gross register and was at the time proceeding from North Woolwich to Goole in water ballast, whilst the *Rosalia*, of 4308 tons gross register, was on a voyage from the Tyne Dock to Genoa with a cargo of coal. The result of the collision was that the *Woodmere* sank in a few minutes; but her crew were saved by getting on board the *Rosalia*, which latter vessel was considerably damaged. The case was tried on February 26, 27, by Bargrave Deane J., who was assisted by two of the Elder Brethren of the Trinity House. The facts fully appear from the judgment delivered on February 28, and the case is reported on the question of the proper application of the provisions, as to the division of loss in

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the case of collisions, contained in the Maritime Conventions Act, 1911. (1)

Laing, K.C., and *Dawson Miller*, for the plaintiffs.
Bateson, K.C., and *Lewis Noad*, for the defendants.

BARGRAVE DEANE J. This action is brought by the owners of a smallish steamer, the *Woodmere*, against the owners of the *Rosalia*, a large Italian ship, for damage caused by a collision in the North Sea, between the Newarp and the Would lightships, on the morning of February 7 in this year. The result of the collision was that the *Woodmere* was sunk, but her crew were all saved by getting on board the *Rosalia*.

In the course of the case I have been struck by the fact that counsel on both sides have been oppressed by the new Act. This is the first case under the Maritime Conventions Act, 1911, and the Court has the duty of apportioning the blame and saying what proportion of the damage should be borne by either ship; and whereas in the old days counsel were content to make out that both vessels were to blame, knowing what the result would be, in this case I cannot help thinking that both learned counsel were fighting hard for a proportion.

The two ships were bound, one up and the other down the North Sea. The *Woodmere* was upon a course of N.W. ½ N. magnetic, and the *Rosalia* on a course of S.E. by S. magnetic, very nearly opposite courses, and in my opinion they were as nearly as possible end on to each other. I think the *Woodmere* was slightly on the port bow of the *Rosalia*—very slightly. There was another steamship also proceeding up (the *Spero*), a ship which was a little faster than the *Woodmere*, and which passed her on her port side shortly before the collision—and I think that that vessel was a little on the starboard bow of the *Rosalia*, so that the *Rosalia*, coming down, had two vessels very nearly ahead of her, one a little on the port bow and the other a little on the starboard bow; but the vessel on the starboard bow was the nearer.

(1) 1 & 2 Geo. 5, c. 57, s. 1, sub-s. 1: "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault."

Now what was the weather? The *Rosalia* admits that it was a dense fog. The *Woodmere* says: "It had been a fog, but at the Newarp it cleared up so that we could see two or three miles, and we went on at full speed." The first fact which I find in the case is against the *Woodmere*. I am satisfied from the evidence of the lightship that it was a dense fog, and that that part of the *Woodmere's* case is not proved. She had slowed down for fog just before she got to the Newarp. She admits there was fog to the southward of the Newarp, and there is no doubt there was fog at the time of the collision, and that was only a very short distance from the Newarp, and in my opinion there was a fog all the time.

The facts, as I find them, are these: The *Rosalia*, coming down in a fog, is said to have been blowing her whistle, and blowing it for fog. She heard on her starboard bow another vessel blowing her whistle for fog, and that vessel, after blowing for fog once or twice and being answered by the *Rosalia* once or twice with fog signals, changed her signal into two short blasts. The *Rosalia* responded with two short blasts, and I think on two or three occasions those two short-blast signals were exchanged between the *Rosalia* and the vessel on her starboard bow, the *Spero*.

The *Rosalia* admits that, hearing, in a fog, a whistle on her starboard bow forward of her beam, she did not obey the rule and stop her engines. That is the initial fault of the whole case. If the *Rosalia* had stopped her engines and continued blowing a long blast for fog, and then proceeded cautiously, I do not know that I could have blamed her for that; but she did not. She proceeded on, as they say on board her, "slightly giving her a touch of starboard helm," and they eventually passed the *Spero* starboard to starboard, very close—I think something like a ship's length apart. That was a fortunate escape for the *Rosalia* and also for the *Spero*, because, although I have not to deal with the *Spero*, there is no doubt that the *Spero* was badly navigated in foggy weather.

Now I have to do with the *Woodmere*. The *Woodmere* heard the *Rosalia* and the *Spero* exchanging two-blast signals. What should the *Woodmere* have done? She should at once have obeyed the rule and stopped her engines. She did not do so.

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She did not blow a long blast for fog, but repeated the two-blast signals which she heard the other vessels blow. That was wrong according to the rules. She heard two whistles—one she knew was blown by a vessel going the same way as herself, and the other by a vessel coming in the opposite direction—and she had no excuse for not stopping her engines then and there. But I think she was misled. When she heard two vessels ahead of her both blowing the starboard helm signals, and very nearly ahead of her, she did what perhaps may not have been unreasonable at the moment—she hard-a-starboarded her helm and put her engines on full speed ahead; but she ought to have stopped, and she is to blame. Both vessels are to blame.

Another matter I have to deal with is the speed of the two vessels. I should think that the *Woodmere* was probably going about nine knots. Her full speed was ten and a half knots, but she probably lost some of the pressure on her boilers and could not attain that, although she was going for some minutes full speed ahead under starboard helm. The *Rosalia*, I am satisfied, was going faster than she admits, I have had the evidence of the surveyor on behalf of the *Rosalia*, and he has to admit that, having surveyed the *Rosalia* and seen the damage upon her, and knowing the fact that the other vessel was sunk very shortly after the contact by reason of the damage caused to her, he is forced to the conclusion that there was at least two knots speed on the *Rosalia* at the time of the collision, although she says she was going full speed astern for four minutes, from dead slow, before the collision. The surveyor admits that it is impossible to avoid the conclusion that the *Rosalia* was going at least six knots before she reversed her engines. Did she reverse her engines for four minutes? It is true the documents say so, but I am forced to the conclusion that I cannot accept the documents and the evidence which has been given. Why? Because I know there was fog further up, by the Haisborough, and the *Rosalia* did not slow down then, but at a later period, when, according to the pilot and the master, it got so thick that they were obliged to slow. The fact is that it would seem that there were three vessels navigating in foggy weather in the North Sea and not obeying the rules.

Now, but for the initial fault of the *Rosalia* I think it probable

that there would not have been any collision; but, on the other hand, I cannot absolve the *Woodmere* from blame for breaking the rules herself and doing what she ought not to have done. Therefore I must find her also to blame.

Now, what is to be done about the new Act of Parliament, which requires (s. 1, sub-s. 1) that the liability to make good the damage sustained in a collision "shall be in proportion to the degree in which each vessel was in fault" and adds a rider that (*a*) "if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

This is the first case arising under the new Act, and therefore I have to start the new practice. I have never heard in the common law of the principle which has now come upon us as a sudden blow, but we must obey the Act of Parliament, and the way in which I shall deal with this case is this: as the initial fault was in the *Rosalia* I shall order her to pay 60 per cent. and the *Woodmere* the other 40 per cent.

With regard to costs. As there is nothing in the Act dealing with that matter, I think that, as both vessels are to blame, and very nearly equally to blame, although, as I have said, I think one was guilty of the initial fault, I shall best meet the justice of the case by making no order as to costs.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

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Nov. 7, 8.

[DIVISIONAL COURT.]

THE KENNET.

Admiralty—Collision—Bow Creek—Rounding Bend—Relative Duties of Steam Vessels with and against the Tide—Good Seamanship.

A collision occurred off Baldwin Point, Bow Creek, between the plaintiffs' barge, in tow of a tug, proceeding from the Thames up the creek with the tide, and the defendants' tug towing a barge down the creek against the tide. In the Court below the tug towing the plaintiffs' barge was found alone to blame for not giving the customary sound signal by way of warning before rounding the sharp bend which exists at that point:—

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), that, apart from any alleged custom, good seamanship required that warning should have been given by the tug towing the plaintiffs' barge, and further that the defendants' tug was also to blame, for she approached the bend at such a speed that she could not stop in time to avoid collision with a vessel which might be on the other side but not visible owing to the sharpness of the corner.

Appeal by plaintiffs, Vokins & Co., Limited, owners of the barge *Ribble*, in an action of damage by collision, against a decision of the deputy judge of the City of London Court finding the tug *Velox*, which was towing the *Ribble*, alone to blame for a collision with the tug *Kennet*, owned by the defendants.

On March 28, 1911, about 10.30 p.m.—the weather being fine and clear, the wind light, variable, and the tide flood of the force of about one knot—the steam tug *Velox*—which had just previously dropped three of her five barges at the Great Eastern Railway Company's wharf, at the bottom of Glasshouse Reach—was proceeding from the Thames up Bow Creek with the remaining two dumb barges in tow, one of which, on the port tow rope, was the *Ribble*, a large iron dumb barge of 160 tons, partly laden with stone. The tug's engines were going easy ahead, and she was rounding the sharp bend off the railway wharf at a speed of some two knots, when, at about 100 yards distant, the masthead and towing lights, and then the green light, of the steam tug *Kennet*, approaching in the opposite direction, were seen broad on the port bow. A short blast was blown on the whistle of the *Velox*, which was

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answered by the *Kennet*, and, according to the plaintiffs, the *Velox* was kept close over to her starboard side, but the stem of the *Kennet* came into contact with the port side of the *Ribble*, doing damage. The plaintiffs, the owners of the *Ribble*, charged the *Kennet* with (inter alia) "approaching the sharp point at too great a speed," neglecting "to wait above the point until vessels bound up had rounded clear," and with failure to comply with the following articles of the Thames by-laws, namely, the preliminary (special circumstances rendering a departure from the by-laws necessary in order to avoid immediate danger), articles 39, 42 (the sound signals to be given by vessels in sight of each other), 46 (passing port to port), and 49 (slackening and stopping and reversing if necessary when approaching another vessel so as to involve risk of collision).

According to the defendants, the *Kennet*, with a barge in tow, was rounding Baldwin Point, Bow Creek, proceeding down the west side of the channel at a speed of about three knots over the ground, when the towing lights and red light of the *Velox* were seen at a distance of about 200 feet on the starboard bow. The *Velox* having given one short blast, the *Kennet* answered it with one short blast, and, putting her helm hard-a-port and her engines full speed ahead, tried to force herself on to a mudbank there as the only chance of avoiding a collision; but, when it was found that the forepart of the *Kennet* would not remain on the bank, her engines were put full speed astern. The defendants alleged that those in charge of the *Velox* and the *Ribble* were not keeping to their starboard side of the channel, that they were navigating at an excessive speed, that the engines of the *Velox* ought to have been stopped and reversed, and that warning should have been given of the approach of the *Velox* and her tows so that the *Kennet* might have waited above the point. They further charged the *Velox* and the *Ribble* with failure to comply with the preliminary and articles 46 and 49 of the Thames by-laws, and counterclaimed for the damage they had sustained.

The learned deputy judge in giving judgment said: "Aided by my assessors, I have come to the conclusion that, in this action, the *Velox* was solely to blame for the collision, on the ground that she did not give the customary warning before

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rounding this point which involved damage to both vessels. There will, therefore, be judgment for the defendants, the *Kennet*, on the claim and counter-claim. We find that the *Kennet* did everything possible to avoid the collision."

1911. Nov. 7. *Bateson, K.C.*, and *Balloch*, for the appellants (plaintiffs), owners of the barge *Ribble*. The *Velox* has been found alone to blame for not giving "the customary warning before rounding this point"; but it is submitted that the alleged custom only applies to steam vessels proceeding straight with the tide, that is, having speed upon them, and not to, as in this case, a tug, which had just dropped three of her barges at the company's wharf close to the spot where the collision occurred, and was starting away again with her two remaining barges, so that she would not have any way upon her. The alleged custom is also inconsistent with article 43 of the Thames by-laws, which forbids the use of any other sound signals than those there referred to.

[BARGRAVE DEANE J. The signals there referred to are those for steam vessels in sight of one another.]

The giving of warning sound signals by steam vessels not in sight of one another, as where they are enveloped in fog, &c., is provided for by article 36, which does not include a case like the present.

If the custom of giving a warning signal is to be admitted it would equally apply to the *Kennet*, but that tug gave no intimation of her approach until she answered the short blast which the *Velox* gave as soon as she saw the lights of the *Kennet*, and if the course indicated by those signals had been followed by the *Kennet* there would have been no collision. Instead of that, as she was coming round the sharp bend at much too great a rate of speed, she was unable to stop, and she, therefore, executed the extraordinary manœuvre of running full speed on to the mud-bank off which she slipped and so came into contact with the *Ribble*. It was the duty of the *Kennet*, navigating against the tide, to wait until the vessel coming in the opposite direction had cleared her at the bend: see *The Talabot*. (1)

(1) (1890) 15 P. D. 194.

Nov. 8. *Laing, K.C.*, and *A. E. Nelson*, for the respondents (defendants and counter-claimants), owners of the *Kennet*. No custom was proved binding the *Kennet* to give the sound signal suggested by the appellants; but if the *Velox* had—whether under the alleged custom or under the rules of good seamanship—warned the *Kennet* that she was coming up with the tide, the *Kennet* could have waited above the point. As it was the speed of the *Kennet* was not excessive, but, placed in a difficulty, she was obliged to execute the manœuvre of running on to the bank, which, in the circumstances, was the best that could be done, and she would have succeeded in avoiding the collision had she not slipped off the mud.

THE PRESIDENT (SIR SAMUEL EVANS). The collision in this case took place at a very sharp bend in the river, and it is obvious that vessels either proceeding up the river or coming down the river ought to navigate very carefully in approaching the bend, because craft may have to pass each other at that particular spot.

The learned deputy judge has found that the *Velox* was to blame because she, going with the tide, did not give any warning to any ship or vessel which might be on the other side of the bend, upon which the duty would fall to stop or take steps to prevent a collision. I see no reason at all for disturbing the judgment of the learned judge, which he came to upon the evidence and upon which he was advised by his nautical assessors. On the contrary, I entirely agree with him. I think, whether this vessel, the *Velox*, was starting with a couple of barges from the wharf or whether she was proceeding straight up, it was her duty to give such a warning as would enable the vessel on the other side to approach the bend in such a way as to prevent any collision. Therefore, the *Velox* is to blame for this collision.

The question which has raised difficulty in my mind is whether or not the *Kennet* is to blame. She was going down river. The tide, which was one knot in favour of the *Velox*, was one knot against the *Kennet*. The collision, in fact, took place by reason of a manœuvre on the part of the *Kennet* just in the bend, which threw her on to a sloping bank, where she could not stick and where it was hardly to be supposed that the master could have thought she

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would stick, though he probably hoped that she would. She did not remain on the bank, but went athwart the river, which is narrow at that point. Counsel for the defendants say that, in the circumstances, that manœuvre was the best which could be executed by those navigating the *Kennet*. Assuming, without deciding, that it was the best manœuvre, we find this: the *Velox* was in a place in the bend where any innocent vessel might be. In this particular case, as I have said, the *Velox* was to blame, but there might have been in that particular spot an innocent vessel, a sailing vessel or a barge; and we find that the *Kennet* proceeds down in such a way that, at this particular juncture, she has got to take what is described by counsel for the defendants as the best possible manœuvre, but which nevertheless brings about the collision. In my view the evidence establishes this, that the *Kennet*, in approaching this difficult bend, must have been navigating carelessly before she got herself into such a position, which made a collision inevitable, on her own story, if any innocent vessel happened to be where the *Velox* was. In the result the appeal must be allowed, and both vessels held to blame.

Bargrave Deane J. I am of the same opinion. I think that good seamanship, at this particular place, requires that a vessel, approaching this bend, or in the bend, going up with the tide should give a warning blast or blasts—more than one, if necessary, because the bend is a long one—to warn vessels which may be coming down that she is proceeding up on the tide. My impression is that the *Velox* ought to have done that before she got up to the place where she dropped some of her barges, and certainly she ought to have done it when she started on after dropping her barges. That would have given a warning to any vessel coming down that there was this obstruction in the way, and that she should not only proceed cautiously, but, if necessary, stop above the bend. It is perfectly clear—and the Court below was right in holding—that the warning should have been given, not because it is the practice—I do not care about the practice—but under the rules of good seamanship. So much for the judgment of the Court below with regard to the *Velox*.

With regard to the *Kennet* I am strongly of opinion that,

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coming down against the tide with a barge in tow, and knowing the place as she did, she should have been proceeding at very much less speed than four knots over the ground. She was going over three and probably nearly four knots. She knew perfectly well that she could not tell, till she got a very short distance from the bend, whether there was any obstruction in the bend or not. There might have been sailing vessels, or dumb barges, which could not signal, in the bend, and the *Kennet* might at any moment be called upon to pull up and keep out of the way of something. She admittedly went on at such a speed that she could not pull up, and she tried to do that which we must not blame her for doing, because she did it at the last moment in the hope of avoiding the collision.

I think both tugs were to blame for this collision—initially the *Velox* for not giving warning blasts, and the *Kennet* for coming at too great a speed to a spot where admittedly she could not see more than 100 yards or so ahead.

Appeal allowed to the extent of finding the Kennet as well as the Velox to blame. No costs here or below.

Solicitors for appellants (plaintiffs), Vokins & Co., Limited: *J. A. & H. E. Farnfield.*

Solicitors for respondents (defendants), owners of the *Kennet: Botterell & Roche.*

T. L. M.

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Jan. 27, 29.

[IN THE COURT OF APPEAL.]

THE UMSINGA.

Admiralty—Ship—Collision—River Thames—Port of London—Compulsory Pilotage—The General Pilotage Act, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59.

The defendants' steam vessel, belonging to the port of London, whilst proceeding, in charge of a duly licensed Trinity House pilot, down the river Thames, bound from London to East Africa with cargo and passengers, came into collision, through the fault of the pilot alone, with some tugs and barges of the plaintiffs in Bugsby's Reach :—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), affirming the decision of Sir Samuel Evans, President ([1911] P. 234), that the defendants were not liable for the damage sustained by the plaintiffs, as pilotage was compulsory, the port of London, within which the collision occurred, being a port in relation to which particular provision, for the appointment of pilots, had been made by charter and by Act of Parliament, within the meaning of 6 Geo. 4, c. 125, s. 59.

The Hankow (1879) 4 P. D. 197, followed.

Appeal by plaintiffs, William Cory & Son, Limited, owners of the tugs *Harlow*, *Grappler*, *Reliance*, and *Growler*, and of the barges *Apollo*, *Edwin*, *Turkey*, and *Aqua*, against a decision of the President (Sir Samuel Evans), in an action of damage by collision, dismissing their action against the defendants, the owners of the steamship *Umsinga*, on the ground that the collision was due to the fault of the pilot alone of the *Umsinga*, who was in charge by compulsion of law.

The case turned on the effect of the provisions of s. 59 of the General Pilotage Act, 1825 (6 Geo. 4, c. 125) (1), in respect of compulsory pilotage in the case of a vessel belonging to the port of London, whilst navigating in that port, but outward bound with passengers.

On October 8, 1909, about 8.30 p.m., the weather being fine and clear, the wind westerly, moderate, and the tide the last of the flood with a force of about half a knot, the *Umsinga*—a steel screw steamship, belonging to the port of London (2), of 2958

(1) The section is set out at p. 235 of the report in the Court below ([1911] P. 234), and in the judgment of Vaughan Williams L.J.

(2) "The port at which a British ship is registered for the time being

tons gross register, with engines of 460 horse power nominal, and manned by a crew of sixty-eight hands—was proceeding down Bugsby's Reach of the river Thames, on a voyage from London to Beira with a general cargo and thirty-two passengers. She was in charge of a duly licensed Trinity House pilot, and was making from three to four knots through the water with her engines working slow. Her regulation lights were duly exhibited and a good look-out was being kept on board of her, when, instead of keeping out of the way of the plaintiffs' barge and tug roads off Charlton, the *Umsinga*, under the circumstances detailed in the judgment of the President in the Court below (1), struck the barge *Apollo*, breaking through the barge roads, setting some of the craft adrift, and driving the barge *Aqua* against the tug *Harlow*, breaking her adrift, and damaging the other craft and tugs above mentioned.

The defendants admitted the collisions with certain barges and tugs belonging to the plaintiffs whilst lying at their barge and tug roads off Charlton, but denied that the collisions were caused by the negligence of their servants, and by paragraph 4 of the defence said that "if, and in so far as, the collisions and damage were caused by the negligent navigation of the *Umsinga*, such neglect or default was solely that of the pilot of the *Umsinga*, who was a duly qualified pilot acting in charge of the *Umsinga* within a district wherein his employment as pilot was compulsory by law, and that for his fault or incapacity the defendants are not answerable."

The case came on for hearing on April 27, 1911, before the President, assisted by two of the Elder Brethren of the Trinity House, and on May 3 the President found that the collision was solely due to the fault of the pilot of the *Umsinga*, the question whether pilotage was compulsory being reserved. On May 17 the question of compulsory pilotage was argued, and on May 19 the President (Sir Samuel Evans) dismissed the plaintiffs' action with costs, holding "upon the authority of *The Hankow* (2) and upon the words of s. 59 of the Act of 1825 (6 Geo. 4, c. 125)

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shall be deemed her port of registry and the port to which she belongs": Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 13.

(1) [1911] P. 234, at p. 237.

(2) 4 P. D. 197.

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that, at the place where the collision happened, there was no exemption from compulsory pilotage in the case of the *Umsinga*." (1)

On appeal the question raised was whether, at the time and place of the collision, the employment of the pilot in charge of the *Umsinga* was by law compulsory, as, if so, the defendants were not liable for the damage sustained by the plaintiffs by reason of the collision.

1912. Jan. 27, 29. *Bateson, K.C.*, and *R. H. Balloch*, for the appellants (plaintiffs), William Cory & Son, Limited.

Laing, K.C., and *Dawson Miller*, for the respondents (defendants), the owners of the *Umsinga*.

The arguments of counsel for the appellants (plaintiffs)—based on the contention that the port of London was not "a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots" within the meaning of s. 59 of the General Pilotage Act, 1825 (6 Geo. 4, c. 125)—fully appear from the report in the Court below (2), and from the following judgments, in which the material sections of the statutes relied on are set out. Reference was made to the Report of the Departmental Committee on Pilotage in the United Kingdom (1911), pp. 5, 19, 45.

The arguments of counsel for the respondents (defendants) also sufficiently appear from the report in the Court below (3) and in the following judgments.

VAUGHAN WILLIAMS L.J. This case has been argued at considerable length, but I am far from saying that it does not raise questions of difficulty. Perhaps I can express the difficulty best in this way. The President (Sir Samuel Evans) includes among the grounds of his decision the case of *The Hankow*. (4) That decision has been questioned, and although the case was decided in 1879, it would be incorrect to say that it has always

(1) The judgment is set out in full in the report of the case in the Court below, [1911] P. 234, at p. 243.

(2) [1911] P. 234, at p. 242.

(3) Ibid. at pp. 241, 242.

(4) 4 P. D. 197.

been accepted as a sound decision under the Acts of Parliament relating to compulsory pilotage, and the authority of the Trinity House, and of the corporations, whom I may speak of as the local pilotage authorities. In fact, not only has that case not always been accepted as a clear exposition of the law, but the decision in *The Hankow* (1), and the decisions in the cases which are referred to in the course of a judgment by Dr. Lushington, have been questioned in various cases which have come before us, including, if I recollect rightly, the question raised by Lord Chelmsford in the House of Lords, and the question raised in the Exchequer Chamber, in *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, which is reported first in 1868 (2), in which the decision was not unanimous—and reported also on appeal in 1869 (3), where one can fairly say that the decision in the Exchequer Chamber may be read and accepted without in any degree affirming or expressing approval of certain cases which had been cited, and are cited also, I think, in Mr. Marsden's book (4), as throwing a doubt upon the decision in *The Hankow*. (1) The cases have been referred to, and they are fairly summarized, in the note in Mr. Marsden's book. That note says: "Sir R. Phillimore considered that the case was governed by *The Killarney* (5), and that *The Stettin* (6) was not to be followed. The question as to the construction of the Act of George IV. was decided in accordance with *The Stettin* (6) in *The General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2) It seems doubtful whether the decision in *The Hankow* (1), that the charter of James II. was a particular provision within the meaning of the Act of George IV., is correct."

Having read those authorities, I do not see that they really cast any doubt upon the decision in *The Hankow* (1), or any doubt upon the efficacy of the charter, as constituting the pilotage authority; but, at the same time, there has been sufficient doubt raised to prevent us in any way dealing with this matter

(1) 4 P. D. 197.
(2) (1868) L. R. 3 Ex. 330.
(3) (1869) L. R. 4 Ex. 238.
(4) Law of Collisions at Sea, 6th ed., p. 244, note (*z*).
(5) (1862) Lush. 427.
(6) (1863) Br. & L. 199.

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on the basis of saying that we are not going to interfere with the decision in *The Hankow* (1), since this is a decision which has stood unchallenged for forty years. I do not think one can properly take up that position.

Having said that, I will proceed to deal with the judgment of the President of the Admiralty Division in this case. He says: "Upon the authorities, the question whether the *Umsinga* was, at the time and place where the collision occurred, exempted from compulsory pilotage depends upon s. 59 of 6 Geo. 4, c. 125. The *Umsinga* belonged to the port of London. She was outward bound, and carried passengers. The collision took place within the port of London. She was, in fact, in charge of a Trinity House licensed pilot at the time." I would like to say a word about the reference by Sir Samuel Evans to the fact that the *Umsinga* was outward bound, and carried passengers. The importance of that is that there is continuously in these Acts an exemption, in respect of pilotage, which applies to outward bound ships not carrying passengers. That is why the President here refers to the fact that this particular ship was carrying passengers. His judgment proceeds: "The question is: Did the collision occur in a port or place in relation to which particular provision was made before the statute of 6 Geo. 4, c. 125, either by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots? If yea, pilotage was compulsory; if nay, the vessel was within the exemption from compulsory pilotage." I think the word "exemption" should be read "exception."

I have already said that, in my opinion, both the Act of Parliament and the charter leave the jurisdiction of Trinity House in the port of London, in respect of compulsory pilotage, unaffected, as it existed before the Act, and nothing has occurred, subject to the exceptions which I have just named, in any way to impair that power vested in the Corporation of Trinity House. I hesitate to repeat again the observations that I made just now, in order to ascertain whether I had exactly grasped the steps in the argument—I will say the excellent and clear argument—of counsel for the respondents (defendants), in

(1) 4 P. D. 197.

dealing with that which I wish to say, in my opinion, was a question which really, having regard to the authorities and the expressions of many judges in those authorities, was a question of considerable difficulty, and one which required really a decision to solve which view was right.

I think, in those circumstances, I ought to deal with the question. The Act of 1808 (48 Geo. 3, c. 104) was a repealing Act, which repealed the antecedent statutory authorities. That being so, one has to look to see whether the Act of 1808, although it repeals all antecedent authorities, in terms re-enacts antecedent powers given to the Trinity House not by a general reference, but by verbal expression ; and, in my opinion, the first result of the words of the Act is such as to leave unimpaired, having regard to the new words of enactment in the statute itself, the powers of the Corporation of the Trinity House, and also, in my opinion, to leave unimpaired their powers under the charter. It is really common ground that, subject to anything else which appears in the Act of Parliament, the result was that the powers of the Corporation of the Trinity House were preserved. I had better read first the words which appear at the end of the recital and then the words of s. 2. After the recital come these enacting words: "That all and every the clauses, provisions, powers, penalties, forfeitures, matters, and things relating as well to pilots appointed by the said Corporation of Trinity House of Deptford Strond, as to pilots of the fellowship of Dover, Deal, and the Isle of Thanet, and to the pilotage by and regulation of all such pilots as aforesaid, and also as to the conduct of all persons in matters of pilotage, within the jurisdiction of the said Corporation of the Trinity House of Deptford Strond, and the Liberty of the Cinque Ports, which are contained in any Act or Acts of Parliament heretofore made, shall be and the same are hereby repealed, except only so far as such Acts relate to any rates of pilotage due or to become due, before the commencement of the respective new rates to be established under the provisions of this Act, or to any penalty or forfeiture incurred or to be incurred, or any other act, matter, or thing done, or to be done, before the establishment of the new rules and regulations which are to be made under the provisions of this Act, or before the commencement

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of the operations of any of the provisions of this Act, in relation to any such matters as aforesaid." There is nothing in that first section which in any way repeals the powers under the charter. Sect. 2 is as follows: ". . . . It shall be lawful for the Master, Wardens, and Assistants of the Guild, Fraternity, or Brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement in the parish of Deptford Strond in the county of Kent (commonly called the Corporation of Trinity House of Deptford Strond), and they are hereby required to appoint and license under their common seal, fit and competent persons, duly skilled, as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, as well between Orfordness and London Bridge, as from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel from the Isle of Wight up to London Bridge, which vessels shall be conducted and piloted by such pilots so appointed and licensed, and by no other pilots or persons whomsoever, except pilots appointed by" what, without disrespect, I may call the minor Trinity Houses.

I do not think there is any suggestion that those words, if they stood alone, would not cover, among other things, the port of London, in respect of ships entering or going out. Then s. 20 reads thus: "And be it further enacted, that it shall be lawful for the said Corporation of Trinity House of Deptford Strond, and they are hereby required to appoint from time to time (as often and for such periods as they in their discretion shall think fit) proper and competent persons at such ports or places in England as they may think requisite (except within the Liberty of the Cinque Ports, and all such other ports and places within or for which provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots) not to exceed five nor less than three persons at each port or place for which any such appointment shall be made, which persons so to be appointed shall be called Sub-Commissioners of Pilotage," &c. Now, the argument of counsel

for the appellants (plaintiffs) is that, by reason of the words I have just read, the port of London itself is excepted from the powers, which I have already read, under s. 2, given to Trinity House. Apart from certain observations in the cases which have been cited to us, I should have thought that that construction, which would deprive the Trinity House of its jurisdiction in respect of pilotage, particularly in respect of compulsory pilotage, was a very difficult construction to accept. Then we were not invited to deal with this matter merely upon the section of the Act of 1808, but we were invited to deal with it under the provisions of s. 59 of 6 Geo. 4, c. 125. I have already alluded to the powers which were given under the Act of 1808, and s. 59 of the Act of 1825 says: "Provided always, and be it further enacted, that for and notwithstanding any thing in this Act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne, inclusive, and the Baltic (all such ships and vessels having British registers, and coming up either (*sic*) by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided; or of any other ship or vessel whatever, while the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel." It has been suggested that s. 59 must be read in relation

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to the section of the earlier Act, in such a way as that the port of London does not come within the enacting part of the statute, but comes within the exemption part of this section. I think I may say that, even apart from shrinking from a decision which construes a section of an earlier Act of Parliament by the provisions in a later Act of Parliament, I cannot come to the conclusion that the argument of counsel for the appellants is a good one.

Before dealing with any fresh subject in any way, I wish to say that, in my own judgment, even if the jurisdiction of the Trinity House were affected by those words in the way which counsel for the appellants suggested, I think that the words of s. 2 of the Act of 1808 are so strong that they really are not affected by s. 59 in the way suggested. Dealing with s. 2 itself, it seems to me that it would be very strange to put such a construction upon the exception in that section as to deprive the Corporation of the Trinity House of this jurisdiction in the port of London itself, which, as I have already stated, is not really a new jurisdiction, but an old jurisdiction taken away by the earlier words of the Act, but re-enacted again, and which really contains this very power, with some additional powers under the charter granted in the reign of James II.—as to the existence and extent of which there can be no sort of doubt, a copy of the charter having actually been produced in Court before Sir R. Phillimore, in the case of *The Hankow*. (1) The learned President, in his judgment, goes on thus: "In my opinion this question was decided by the case of *The Hankow*. (1) That decision was pronounced in 1879. Fifteen years afterwards the Merchant Shipping Act, 1894 (which, no doubt, is almost, but not quite, a purely consolidating statute), was passed. Both long before, and ever since, 1879 the practice has been to treat the Thames as a port or place where pilotage is compulsory. Whether I thought *The Hankow* (1) was rightly decided or not, I should feel bound to follow it in these circumstances, and after this lapse of time."

I have already said that I am not sure that I should recognize that obligation quite to the extent Sir Samuel Evans has, because

(1) 4 P. D. 197.

of the comments made in high places as to the value of *The Hankow*. (1) The President proceeds: "Other cases which were cited, and said to be inconsistent with it—namely, *The Killarney* (2), *The Stettin* (3), and *General Steam Navigation Co.* v. *British, &c., Co.* (4)—were not decisions on the same point"—I entirely agree —"But I wish respectfully to add that, in my opinion, the decision in *The Hankow* (1) was right, not only on the ground upon which it was rested, namely, that the locus of the collision was in a port or place, in relation to which particular provision for the appointment of pilots had been made by charter before the passing of 6 Geo. 4, c. 125, but also on the ground that such a provision had also been made before that time by an Act or Acts of Parliament. The Act then in force was 48 Geo. 3, c. 104. Other Acts to a similar effect had preceded this. I hold upon the authority of *The Hankow* (1), and upon the words of s. 59 of the 1825 Act, that, at the place where the collision happened, there was no exemption from compulsory pilotage in the case of the *Umsinga*."

I wish most emphatically to say that I agree with Sir Samuel Evans. I should have been content to base my decision upon 48 Geo. 3, c. 104, even though there had been no charter at all; and I wish, also, to say that my construction of 48 Geo. 3, c. 104, has been in no way displaced by s. 59 of 6 Geo. 4, c. 125, upon which counsel for the appellants laid such stress. I think this appeal must be dismissed.

FARWELL L.J. I also am of opinion that this appeal fails. We are asked to reverse the decision of the learned President, who has not only followed, but expressly agreed with, the decision of Sir Robert Phillimore in *The Hankow* (1), a decision which has been acted upon ever since 1879 without dissent. It differs, no doubt, from the earlier decision in *The Stettin* (3) of Dr. Lushington, but Sir Robert Phillimore explained his reason for not following that decision, and the reason seems to me to be amply sufficient.

The present case, as argued, has turned upon the construction

(1) 4 P. D. 197.
(2) Lush. 427.
(3) Br. & L. 199.
(4) L. R. 3 Ex. 330; L. R. 4 Ex. 238.

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of 6 Geo. 4, c. 125. It appears from the preamble to that Act that for centuries the Trinity House has had jurisdiction over pilots. The Act then proceeds to deal with pilotage, leaving charters untouched, but repealing former Acts and setting out fresh regulations, leaving to the Trinity House the appointment of pilots in the London district. Then it creates what are now known as the Trinity outports; s. 5 empowers the Trinity House to appoint sub-commissioners, who are to make inquiries, and give their certificate as to pilots in the outports—that is to say, places which have no pilotage authority, and where it is deemed expedient that provision should be made for future pilotage. By this section of the Act the Trinity House is enabled to appoint pilots in the port of London and various other specified places, and also to appoint pilots in other districts, and the exception upon which reliance is placed is as follows: "That it shall be lawful for the said Corporation of Trinity House . . . . and they are hereby required to appoint from time to time . . . . proper and competent persons, at such ports or places in England as they may think requisite (except within the Liberty of the Cinque Ports, and all such other ports and places within or for which particular provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots) . . . . which persons so to be appointed shall be called sub-commissioners of pilotage," &c.

It is seriously argued that that exception does not apply to London; and, therefore, that this Act of Parliament, having empowered the Trinity House to appoint pilots for London, went on to treat London as an outport, and authorized them to appoint commissioners to recommend the appointment of pilots for the outports—one of such outports being London. It seems to me that that construction is contrary to the clear intent of the Act. But at any rate the words "any charter or charters" are perfectly clear, and, to my mind, it is a clear case so far as s. 5 is concerned. I do not think s. 59 has anything to do with it. It refers back to the same exception, and does not in any way alter or enlarge that exception.

If that be so, the whole of the rest of the argument for the

appellants falls to the ground, because their argument is that the words of the later Act of George IV. are to be construed in the same way as the Act of 1808. If the words in the 1808 Act do extend to London, then s. 59 of the later Act does not help. I have already said that, in my opinion, it is clear that s. 20 of the Act of 1808 (s. 5 of the Act of 1825) does not extend to the port of London, because it is already specifically dealt with by the Act itself; but, in my opinion, it is not a proper method of construction to fasten on words in a later Act which bear some resemblance to words in an earlier Act and apply them as if they were a definition clause to be read into the subsequent Act. The word "particular" appears to me to have very great importance, and to shew that different considerations apply to the later Act. I entirely agree with what the President has said on this point. In the case before Dr. Lushington (*The Stettin* (1)) the charter of James II. was not referred to, and in the Privy Council it went off on another point, and nothing was said about this particular question. I fail to find anything in the cases which throws doubt upon the decision in *The Hankow*. (2)

KENNEDY L.J. I am of the same opinion. We are asked to reverse the decision of the President of the Admiralty Division upon a question which is no doubt of some importance, but as to which, in the first place, there is a decision now thirty-two years old which has never been, as far as I am aware, questioned in any Court of law before. The cases referred to, of *The Stettin* (1) and of the *Steam Navigation Co.* (3), in the Exchequer were earlier cases, and *The Hankow* (2), as far as I know, and as far as counsel can tell us, is a case that has never been assailed before in regard to the correctness of its principle. It is true that in the learned work of Mr. Marsden (4) doubt is thrown on the correctness of the principle, but there is nothing to be found in any case which followed *The Hankow* (2) which in any way weakened the authority of that case.

How, then, does the case stand apart from authorities? We

(1) Br. & L. 199.
(2) 4 P. D. 197.
(3) L. R. 4 Ex. 238.
(4) Collisions at Sea, 6th ed., p. 244, note (*z*).

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have got in the case of the *Umsinga* a vessel carrying cargo and passengers. She was outward bound, and was no doubt a vessel which was registered in the port of London. Therefore she was a vessel which in terms of the statutes was a vessel belonging to the port or place of London. She pleaded compulsory pilotage, and that plea was upheld. It is said that it is wrong, and the question of its being right or wrong depends, as argued before us, upon the true construction and meaning of s. 59 of 6 Geo. 4, c. 125, which I need not read at length, as it is set out in the note at p. 235 of the report of this case in the Court below. (1) The gist of that section, so far as material, is this, that, in regard to a vessel which is within the limits of the port or place to which she belongs, there is an exemption from compulsory pilotage, subject to this, that that port or place to which she belongs is not a port or place "in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots."

It is argued by counsel for the appellants that the *Umsinga* does not fall within that limitation of the exemption, because they say that the port of London is not a place "in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters," within the meaning of the section.

Now, certain things have to be admitted. In the first place there is a charter of James II., and it is not contended by counsel for the appellants that that is not a charter which can properly be described as a charter which does contain provisions for the appointment of pilots. But, more than that, there is also the Act of 48 Geo. 3, c. 104, which (by s. 2) expressly gave the Trinity House power to appoint and license under their seal fit and competent persons as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing up and down or upon the rivers of Thames and Medway, &c. That Act was an Act which, by its last section, was expressed to have a duration of only four years, and so when the four years were up, in 1812, came a section, which is practically to the same effect, in the Act of 52 Geo. 3, c. 39 (s. 2), which enacts, practically in the same

(1) *The Umsinga* [1911] P. 234.

terms, the appointment and licensing of pilots by the Trinity House.

In face of those facts it is said that none the less is this particular port of London not a place "in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters." I hope I have done the learned counsel justice. As I understand them, they say you must not construe "particular provision" in s. 59 of 6 Geo. 4, c. 125, as it would otherwise be construed, because, if you do, you thereupon strike out all the places to which the exemption can apply—you must except the port of London, because if you do not except it, then you shew that there is really no place in which a vessel belonging to a port or place will have the benefit of the exemption.

I decline altogether, because a difficulty may arise in finding something to which the section applies, to give the words "particular provision," &c., any other than their natural meaning. I do not myself, however, think that difficulty exists. Before I point out why I do not, I will just say that the argument for the appellants—in saying that the words "particular provision" do not apply—is to say that you are to construe them by the light of s. 20 of the Act of 48 Geo. 3, c. 104, in which it was enacted that it should be lawful for the Corporation of Trinity House to appoint from time to time proper and competent persons as sub-commissioners who are to examine and certify pilots at such ports or places in England as they may think requisite, "except within the Liberty of the Cinque Ports, and all such other ports and places within or for which provision shall have been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots." I think that the word "provision" in the earlier statute and the words "particular provision" in the later statute were in each case properly used, and that each expression has its natural and appropriate meaning. I think that by s. 2 of the Act of 1808, as well as by charter, the port of London was a place for which provision had been made when that Act of George III. was passed.

There were three classes of places at that time. There were

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certain places for which there had been an express provision, such as I think was made by charter for the port of London, and such as had been made for the Cinque Ports. There were also places outside London and the Cinque Ports altogether, which had special charters—I do not know whether any have special Acts of Parliament—and there were also places for which no provision had been made, and for the benefit of which, no doubt, this statute was passed. It was felt that there should be pilotage provision made for those places, and pilotage provision taking the form of the licensing of pilots, whose services should be employed by those who travel in or out of those ports by ship. So the Trinity House was dealt with as a central authority, in whose hands authority might be put to appoint Commissioners to appoint pilots in those places for which no provision had been made. Those places did not include the Cinque Ports or those places for which there had been express provision, but for all such other places there was to be a pilotage jurisdiction created for the first time; and then that is—as counsel for the respondents pointed out—supplemented by s. 55 of the Act of 1808, which, with regard to the matter we have discussed—namely, the position of the master of a vessel who is navigating the waters of his own port—protects such a person from being prejudiced by the creation of pilots and compulsory pilotage in a district in which it had not existed before. It was provided that the masters of vessels belonging to those ports should still be able to navigate in those ports without taking a pilot on board. So, when you come to s. 59 of 6 Geo. 4, c. 125, what the Legislature said was this: There shall be an exemption generally from compulsory pilotage of vessels within the limits of the port to which those vessels belong, but we are not going to interfere with the operation of other Acts of Parliament, or charters, where they have made "particular provision"; in other words, we are not going by this section of 6 Geo. 4, c. 125, to alter the law whereby under those Acts of Parliament and charters, by particular provision, it is at present compulsory to employ a pilot even on a vessel which belongs to that port. Therefore, the Legislature created a large class of outports for which pilots were hereafter to be appointed, but which could not say they had

particular provision, but only the general provision of s. 20 of the Act of 1808.

To my mind it is as clear as I can reasonably expect anything to be that this Act of Parliament was specially drafted to leave a large class of places in which the masters would still enjoy the privilege left them by s. 55 of the Act of 1808, which by a general provision made them pilotage districts, but still meant to prevent the exemption applying to places in relation to which there had been a particular provision made either by Act of Parliament or by charter. Counsel for the appellants say that if London is excepted from the exemption, there is nothing to which the section can apply. I think there is.

For these reasons I think that the learned President was perfectly right, and I will add to what my Lord has said my concurrence in the view that even without the charter of James II. these two successive Acts of 1808 and 1812 make particular provision for pilotage in the port of London.

Appeal dismissed.

Solicitors for the appellants (plaintiffs), William Cory & Son, Limited: *Keene, Marsland, Bryden & Besant.*

Solicitors for the respondents (defendants), the owners of the *Umsinga: Thomas Cooper & Co.*

T. L. M.

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Feb. 27;
March 11.

BROOKE *v.* BROOKE (The King's Proctor Shewing Cause).

Divorce—Wife's Petition—Decree Nisi—Intervention and Plea by King's Proctor — Material Facts—Withholding or Suppression — Petitioner's Answer to Plea—Fresh Allegations in regard to the Respondent—Powers and Practice of the Court.

Even where it appears that material facts were deliberately withheld or wilfully suppressed at the hearing of a petition for dissolution of marriage, the Court must, upon an intervention by the King's Proctor, take into consideration all the facts proved in evidence under the King's Proctor's plea or the answer thereto filed by the petitioner, before deciding whether the decree nisi should be rescinded; or whether the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, should be exercised in favour of the petitioner with a view to the decree being made absolute; or whether a middle course should be adopted with a view to further inquiry and elucidation of the facts.

The circumstances of each particular case must be dealt with as justice may require, regard being had, not merely to the parties themselves, and to others who may be interested in, or affected by, the decision of the Court, but to public decency and morality and the welfare and interests of society and the State.

The Court may, if thought fit, suspend its decision, and may direct that notice of any fresh allegations, raised for the first time in the petitioner's answer to the King's Proctor's plea, shall be served upon the respondent.

Roche v. *Roche* (*The King's Proctor shewing Cause*) [1905] P. 142, disapproved.

Pretty v. *Pretty* (*The King's Proctor shewing Cause*) [1911] P. 83, approved.

A decree nisi was pronounced in this case on May 22, 1911, on the grounds of desertion and adultery. The cruelty alleged in the petition was not gone into, and was only incidentally mentioned at the hearing.

The King's Proctor's plea, filed on October 31, 1911, prayed the Court to refuse to make the decree absolute, to dismiss the petition, to condemn the petitioner in the costs of the King's Proctor, and to make such order in the premises as might seem fit.

The allegations in the plea were:—

"1. That divers material facts have been withheld from the knowledge of the Court by the said petitioner.

"2. That the said petitioner has frequently committed adultery with Arthur Edward Coleman.

"3. That in or about the month of June, 1909, at some place unknown the said petitioner committed adultery with the said Arthur Edward Coleman, and that on the 16th day of March, 1910, at 232A, Commercial Road, Peckham, in the county of London, the said petitioner gave birth to a male child of which child the said Arthur Edward Coleman is the father.

"4. That during the month of November, 1909, the said petitioner was living in adultery with the said Arthur Edward Coleman at 747, Old Kent Road, in the county of London.

"5. That from the 29th day of November, 1909, until the 25th day of April, 1910, the said petitioner was living in adultery with the said Arthur Edward Coleman at 232A, Commercial Road, Peckham, aforesaid."

Particulars of date and place in respect of paragraphs 1 and 2 were ordered, and on December 1, 1911, were delivered by the King's Proctor, to the effect that the "divers material facts withheld from the knowledge of the Court" were the facts of the petitioner's own adultery, as alleged in paragraphs 2, 3, 4, and 5 of the plea; and that as to paragraph 2 "the King's Proctor is unable at present to give any further particulars than are contained in paragraphs 3, 4, and 5 of the said plea."

The petitioner, Lavinia Florence Brooke, by Messrs. Surridge & Mullis, her solicitors, filed her answer to the plea of the King's Proctor, in the following terms:—

"1. That she admits the allegations contained in paragraphs 2, 3, 4, and 5 of the said plea.

"2. That she did not wilfully withhold material facts from the knowledge of the Court, being unaware that there was any duty or obligation on her part to disclose the matters referred to in paragraphs 2, 3, 4, and 5 of the said plea.

"3. That the respondent, Frederic Marie Brooke, has been guilty of such wilful neglect and misconduct towards the petitioner as has conduced to her said adultery.

"4. That the said respondent has been guilty of cruelty towards the petitioner.

"5. That in or about November or December, 1908, the said

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respondent deserted and wilfully separated himself from the petitioner before the said adultery was committed.

"6. That in the month of August, 1907, at Gibraltar the said respondent committed adultery with a woman unknown to the petitioner and thereby contracted a certain venereal disease, to wit syphilis, and subsequently he recklessly and wilfully communicated the said disease to the petitioner and was thereby guilty of cruelty."

The petitioner accordingly prayed the Court to reject the prayer of the King's Proctor and to dismiss his said plea; to make absolute the decree nisi dissolving the marriage of the petitioner with the respondent; and "to grant the petitioner such further and other relief in the special circumstances of the case as may be just."

On January 17, 1912, the King's Proctor issued a summons to shew cause why paragraphs 3, 4, and 6 of the petitioner's said answer should not be struck out; or, in the alternative, that the petitioner should deliver full particulars of the allegations contained in the said paragraphs; and why the Court should not make such further order as might be just.

This summons was ultimately adjourned into Court for fuller argument.

Barnard, K.C. (*W. O. Willis* with him), for the King's Proctor. The three paragraphs 3, 4, and 6 should be struck out, for they disclose new materials which were not put before the Court at the hearing. The decree nisi was obtained on the ground of desertion and adultery, although it is true that upon one occasion the petitioner's counsel stated that there had been cruelty. Under s. 31 of the Matrimonial Causes Act, 1857 (1), the Court has discretion to grant a divorce upon certain facts brought to the knowledge of the Court in reference to the conduct of the petitioner. Sect. 7 of the Matrimonial Causes Act, 1860 (2), is the section under which the King's Proctor's duties are defined, but the period of three months for intervention has now been extended to six months by the Matrimonial Causes Act, 1866. (3)

(1) 20 & 21 Vict. c. 85. (2) 23 & 24 Vict. c. 144.
(3) 29 & 30 Vict. c. 32, s. 3.

It is important in the interests of the public that this question should be considered, for in recent years a practice has arisen, and is now becoming very frequent, for petitioners to come before the Court and withhold material facts, and then, when the King's Proctor intervenes, to ask the Court to exercise its discretion. It is no part of the King's Proctor's duty to argue questions of discretion if material facts have not been kept back, but the modern practice referred to frequently compels the King's Proctor to deal with new facts without having had an opportunity of sifting the fresh evidence upon which petitioners ask for the exercise of the discretion of the Court. This practice involves a waste of public money and is contrary to the spirit of the Acts.

In the present case the King's Proctor intervened with reference to the only facts proved, namely, desertion and adultery, and now the petitioner in answer to the plea of the King's Proctor sets up cruelty and conduct conducing to the adultery of the petitioner. The respondent is in Buenos Aires. He has no notice of this intervention. The King's Proctor cannot obtain information from him to put before the Court at the present time. The paragraphs ought to be struck out.

The King's Proctor, however, desires to bring before the Court the wider question whether, if a petitioner obtains a decree fraudulently—for the withholding of facts such as those admitted must be fraudulent—he or she is liable to a rescission of the decree. A former President of this Division called attention to this point in *Evans* v. *Evans and Elford*. (1) But there seems to have been a conflict in the views taken by the judges as to whether, when material facts have been kept back, the decree should be rescinded or not: *Roche* v. *Roche* (*The King's Proctor shewing Cause*) (2); *Hunter* v. *Hunter* (*The King's Proctor shewing Cause*). (3) But there is a distinction between those two cases inasmuch as in *Hunter* v. *Hunter* (3) practically all the material facts had been brought before the Court in the first instance, whereas in *Roche* v. *Roche* (2), which it is submitted is a direct authority here, most of the material facts had been kept back.

(1) [1906] P. 125, at p. 134. (2) [1905] P. 142.
(3) [1905] P. 217.

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Alexandre v. *Alexandre* (*The Queen's Proctor shewing Cause*) (1) was the case on the authority of which *Hunter* v. *Hunter* (2) purports to have been decided, but it does not seem that there were any material facts kept back in *Alexandre* v. *Alexandre*. (1) The main fact kept back in *Alexandre* v. *Alexandre* (1) was not really material; the first adultery had been condoned, whereas the second adultery had not. The condonation of the first adultery was not, in substance, material, because that adultery was revived by the subsequent adultery, and Lord Penzance said that the Court could not and ought not to withhold a decree under those circumstances. If it had been a question of collusion, and a material fact had been kept back collusively, the Court must have rescinded the decree.

The case of *Symons* v. *Symons* (*The Queen's Proctor intervening*) (3) has no bearing upon the principle which the Court is now invited to settle. [*Burdon* v. *Burdon* (*The Queen's Proctor shewing Cause*) (4) was also referred to.]

It is no hardship to petitioners to lay down a rule that they must disclose material facts in the first instance, and upon default should incur the penalty of having the decree reversed.

J. Harvey Murphy, for the petitioner. The arguments addressed to the Court have no regard to the well known principle of law, that persons are not bound to criminate themselves. Every charge of cruelty and adultery must be pleaded, according to the King's Proctor's contention, or it is a fresh fact. At the time this petition was filed the petitioner's advisers had information as to the venereal disease, but the petitioner was advised that the evidence fell short of what according to the law which then prevailed was necessary. The case of *Browning* v. *Browning* (5) had not then been decided.

In the present petition there were included specific charges of cruelty and various charges of adultery, although only one of the charges of adultery was proved in addition to the charge of desertion.

The strongest reported case of the exercise of the Court's

(1) (1870) L. R. 2 P. & M. 164.
(2) [1905] P. 217.
(3) [1897] P. 167.
(4) [1901] P. 52.
(5) [1911] P. 161.

discretion in favour of a guilty petitioner is *Pretty* v. *Pretty* (*The King's Proctor shewing Cause*). (1) [He also referred to *Bullock* v. *Bullock*. (2)]

[SIR SAMUEL EVANS, PRESIDENT. That does not touch the present case. I have a very strong opinion that, if a discretion is given by the Legislature, it should be as unfettered as possible.]

The case of *Hunter* v. *Hunter* (*The King's Proctor shewing Cause*) (3) is very much in favour of the present petitioner. With the exception of paragraph 6, there is practically no new material before the Court upon the present pleadings.

As to the general principle which the Court is now invited by the King's Proctor to lay down, it is submitted that the King's Proctor has no duty to argue, and has no right to argue any point, unless under the direction of the Attorney-General.

Barnard, K.C., in reply.

SIR SAMUEL EVANS, PRESIDENT. I should have been prepared to deal with this case immediately, but, inasmuch as I am asked to lay down some general rule for guidance in these cases, I will consider the form of my judgment.

Cur. adv. vult.

March 11. SIR SAMUEL EVANS, PRESIDENT. After the decree nisi in this case, the King's Proctor intervened.

He intervened under the provisions of the earlier part of s. 7 of the Matrimonial Causes Act, 1860 (4), alleging that material facts had not been brought before the Court. He therefore came in to intervene as any one of the public might have done.

There is a provision at the end of the section under which only the King's Proctor can intervene on the ground of collusion. No collusion is alleged in this case; and this judgment does not in any way deal with an intervention on the ground of collusion.

By his plea, the King's Proctor alleges that the material facts which had been withheld from the knowledge of the Court were as follows: that the petitioner (who was the wife of the respondent) had frequently committed adultery with one Arthur Coleman (paragraph 2); that she had so committed adultery in

(1) [1911] P. 83.
(2) (1910) 103 L. T. 847.
(3) [1905] P. 217.
(4) 23 & 24 Vict. c. 144.

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June, 1909, and that on the 16th day of March, 1910, she gave birth to a male child of which the said Arthur Coleman was the father (paragraph 3); that during November, 1909, the petitioner was living in adultery with the said Arthur Coleman at a place named (paragraph 4); and that from the 29th day of November, 1909, until the 25th day of April, 1910, the petitioner was living in adultery with the same man at another place named (paragraph 5).

By her answer to the King's Proctor's plea, the petitioner admits all these allegations, but says that she did not wilfully withhold these facts, being unaware that there was any duty upon her to disclose them. (I observe upon this, that in framing her petition and in presenting her case, she had the assistance of a London firm of solicitors.)

Her answer further contains the following three paragraphs:—

(3.) That the respondent F. M. Brooke has been guilty of such wilful neglect and misconduct towards the petitioner as has conduced to her said adultery.

(4.) That the said respondent has been guilty of cruelty towards the petitioner.

(6.) That in the month of August, 1907, at Gibraltar the said respondent committed adultery with a woman unknown to the petitioner and thereby contracted a certain venereal disease, to wit syphilis, and subsequently recklessly and wilfully communicated the said disease to the petitioner and was thereby guilty of cruelty.

The King's Proctor issued a summons before me asking for an order that these three paragraphs should be struck out. At his counsel's request, I adjourned the summons into Court for argument.

First, it was argued that the paragraphs in question should be struck out, as they consisted of new matters which were not put before the Court at the hearing of the petition; and that the King's Proctor had no obligation, or opportunity, to ascertain the facts with regard to these new matters.

Secondly, it was stated by Mr. Barnard, for the King's Proctor, that a practice had arisen, and was being frequently resorted to, for petitioners to come before the Court and to withhold material

facts; and then, upon the hearing of the case on the King's Proctor's intervention, either to deny the charges made by him, or to admit them (as in the present case) and place before the Court new facts which had been previously withheld, in order to try to induce the Court to exercise its discretion in their favour under s. 31 of the Matrimonial Causes Act, 1857. (1) It is said that this practice causes an unjustifiable expenditure of public money; and further that as the King's Proctor has not, or has not been given, opportunities of investigating the truth of the new matters, it might happen that the Court would exercise a discretion in favour of petitioners, which it would have exercised differently if the King's Proctor had been able to make further inquiries.

In these circumstances, the King's Proctor desires, if possible, that a settled rule of practice should be laid down which would be a guide to him in similar cases in future.

Upon the first point, the only ground upon which the Court was asked to strike out the three paragraphs referred to was, that whenever material facts have not been brought before the Court upon the hearing of the petition, the Court must rescind the decree nisi.

I have looked into all the cases cited, and into others besides. Most of them have been dealt with by Sir Gorell Barnes, when he was President of this Court, in his judgment in *Hunter* v. *Hunter*. (2) It is therefore unnecessary for me to deal with them in this judgment.

The case of *Roche* v. *Roche* (3), which was relied on for the King's Proctor, was discussed by Sir Gorell Barnes in the judgment just referred to. That case appeared to decide that whenever material facts had been withheld the decree nisi must be rescinded, even though the Court would have pronounced a decree in favour of the petitioner if the facts had been originally disclosed. Sir Gorell Barnes declined to follow that decision.

Subsequently, probably by reason of the judgment in *Hunter* v. *Hunter* (2), Bargrave Deane J. (who decided *Roche* v. *Roche* (3)) acted notably at variance with it in *Pretty* v. *Pretty*. (4) No

(1) 20 & 21 Vict. c. 85.
(2) [1905] P. 217.
(3) [1905] P. 142.
(4) [1911] P. 83.

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authorities are cited in the report of the latter case; but *Roche* v. *Roche* (1) and *Pretty* v. *Pretty* (2) cannot possibly stand together, and *Roche* v. *Roche* (1) cannot now be regarded as of any authority.

The result of the authorities appears to me to be that upon an intervention by the King's Proctor, even where material facts have been deliberately suppressed, or withheld, at the original hearing, the Court must consider all the facts then established by either the King's Proctor, or the petitioner, before deciding whether it will rescind the decree nisi, or exercise a discretion under s. 31 of the Matrimonial Causes Act, 1857 (3), or adopt some intermediate course which would necessitate a further inquiry in order to ascertain the true facts.

I therefore cannot accede to the application of the King's Proctor to strike out paragraphs 3, 4, and 6 of the petitioner's answer to the King's Proctor's plea.

Upon the second part of the King's Proctor's application, it is difficult, and impracticable, if not impossible, to lay down a definite rule of practice applicable to all cases. Each case must be dealt with upon its own facts. This is especially so where a discretion is given to the Court—a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances.

I would respectfully deprecate any attempt to fetter this discretion by any strict or inelastic rules laid down either in this Court, or in any Appellate Court, other than such as may be essential in principle by reason of the provisions of the Acts of Parliament which confer the discretion upon the tribunal to which it is entrusted.

It must not be thought that I deem the withholding or suppression of material facts from the Court on the hearing of a petition as unimportant. On the contrary, I think it is of grave importance that they should be laid before the Court from the first, especially when the Court is going to be asked to apply itself to the question of discretion under s. 31 of the Matrimonial Causes Act, 1857. (3) Where they are not, the Court ought not

(1) [1905] P. 142. (2) [1911] P. 83.
(3) 20 & 21 Vict. c. 85.

to, and will not, pass over lightly the omission to disclose them, whether the omission be intentional, or deliberate, or (as is sometimes said) fraudulent; or whether it be due to some more innocent reason (as is alleged in the present case). And it must not be assumed that it is only where the omission is deliberate, or fraudulent, that the Court may rescind the decree nisi.

Petitioners who do not place before the Court all material facts which ought to be known to the Court have no right to complain if the result entails more delay and further expense, even though they may achieve their object ultimately.

So important do I consider it to be that all the facts which the Court should know in order to be able to "deal with the case as justice may require" (to use the words of s. 7 of the Act of 1860) that I desire to call attention to a couple of passages in the judgment in *Hunter* v. *Hunter* (1) which appear to restrict, I think unduly, the ambit of the "material facts" which ought to be brought before the Court.

One is to be found on p. 228 of the report, and is as follows:—

"Facts which are kept back are only material if, when disclosed, the Court would say that, knowing these facts, the Court would not allow the decree."

The other is on p. 229 of the report, and reads thus:—

"Facts though improperly suppressed which if known would not have prevented a decree being made, and make no difference to the ultimate decision, become strictly speaking immaterial, though of course it is obvious that concealment of facts would make it extremely difficult for a person concealing them to convince a Court afterwards that if they had been known they would not have affected his right to a decree."

These passages might produce the impression that only such facts are "material" (within the meaning of s. 7 of the Matrimonial Causes Act, 1860) as would, if disclosed, actually induce the Court to refuse the decree.

With genuine respect for the learned President from whose judgment those passages have been taken, I think the meaning which he appeared to attach to the words "material facts" is too limited.

(1) [1905] P. 217.

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In my view, all facts are "material" which the Court ought to know, to consider, and to weigh, in determining how its discretion should be exercised, whether after the facts are ascertained, considered, and weighed, the Court may pronounce a decree in favour of the petitioner, or dismiss the petition for the decree.

And in this connection, it must be remembered that the Court has to "deal with cases as justice may require" not merely in accordance with what may be desirable or right for the parties immediately concerned (namely, the husband and the wife), or for persons whose interest is more remote (e.g., issue, or persons who may be affected by orders as to settlements of property), but also in accordance with what is right in the interests of public decency, and of the State.

In this particular case, the facts withheld were clearly "material facts." The circumstances in which they were withheld, and the pleas raised by the petitioner in her answer to invoke the discretion of the Court, will be duly considered when the case upon the King's Proctor's intervention comes to be heard. And the Court will do its best, either by rescinding the decree nisi, or by suspending its operation, or by ordering a further inquiry, or by directing that notice of the fresh allegations should be served on the respondent, or by some other proper means, to enable the King's Proctor, or others, to make further investigations, and to lay before the Court all it should know in order to guide it to use its discretion justly.

Solicitors for petitioner: *Surridge & Mullis, for A. E. Floyd, Bishop's Stortford.*

The King's Proctor.

H. D. G.

THE MONICA.

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Dec. 11, 12, 13.

Admiralty—Ship—Collision—Lights—Preliminary Act and Answers—Practice —Rules of the Supreme Court, 1883, *Order* XIX., *r.* 28 (*k*), (*l*).

The particulars furnished by the defendants by way of answers to questions (k) ("the lights (if any) of the other vessel which were first seen") and (l) ("whether any lights of the other vessel, other than those first seen, came into view before the collision"), in the preliminary act, filed in an action for damage by collision, under Order XIX., r. 28, of the Rules of the Supreme Court, 1883, were as follows: To question (k), "The masthead towing and both side lights of the *Tavistock*," and to question (l), "None":—

Held by the President (Sir Samuel Evans), that the practice was wrong in that the answer to question (l) was not sufficiently explicit, as it did not state what other (if any) lights were seen and the precise alterations in the lights. The answer to question (l) ought to state what new combination of lights was seen after the first lights were observed.

Action of Damage by Collision.

The plaintiffs were the owners of the dumb barge *C.I.V.* The defendants were the owners of the steamship *Monica*.

The case is reported on the question of the proper mode of stating, in the preliminary act, the particulars as to the lights seen of the other vessel required by Order XIX., r. 28, of the Rules of the Supreme Court, 1883. (1)

(1) Order XIX., r. 28: "In actions in any Division for damage by collision between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act, which shall be sealed up, and shall not be opened until the pleadings are completed and a consent signed by the respective solicitors that the preliminary act shall be opened is filed in the Admiralty Registry, and which shall contain a statement of the following particulars:

". . . .

"(k) The lights (if any) of the other vessel which were first seen;

"(l) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

". . . ."

Note. Questions (k) and (l) are numbered 10 and 11 in the printed form of preliminary act used in admiralty proceedings.—T. L. M.

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On November 23, 1910, about 6.40 P.M., the weather being slightly hazy with sleet and rain, the wind easterly, moderate, and the tide about high water slack, the *C.I.V.*, an iron-decked dumb barge, belonging to the port of London, classed for 150 tons, was in the lower part of Blackwall Reach of the river Thames proceeding, in tow of the steam tug *Tavistock*, from the Albert Dock to Millwall Dock, laden with a cargo of copra, and in charge of a waterman lighterman. The *C.I.V.* was one of six barges in tow of the *Tavistock* in the third rank on the starboard tow rope, and, according to the plaintiffs, the *Tavistock* was proceeding up river well to the northward of mid-channel under slight starboard helm, and was making from four to five knots, with the *C.I.V.* and the other craft following in her wake. The regulation masthead, towing, and side lights for a vessel engaged in towing another vessel were being duly exhibited on the *Tavistock*, as well as a white light on the stern of the *C.I.V.*

In these circumstances those on board the tug observed, distant about half a mile and bearing about one point on the starboard bow, the masthead and green lights of a vessel which proved to be the *Monica*, an iron screw steamship of the port of Hull of 841 tons gross register, engines of 99 horse power nominal, and manned by a crew of seventeen hands, in charge of a pilot, and in the course of a voyage from the Regent's Canal, London, to Hull in ballast.

The plaintiffs alleged that the *Tavistock* was kept under her slight starboard helm, and that her steam whistle was sounded two short blasts, that the *Monica* replied with two short blasts, and that the tug kept on shaping with her craft to pass the *Monica* all clear starboard side to starboard side; that the *Monica* passed the *Tavistock* all clear, but, after doing so, sheered to starboard, as if under port helm, causing danger of collision with the craft in tow of the tug, and coming on at high speed, and opening her red light to the *C.I.V.*, with her stem and starboard bow struck the starboard bow of the *C.I.V.* a heavy blow, breaking her adrift, and doing her such damage that she shortly afterwards sank.

According to the defendants the collision was solely caused by the negligent navigation of those in charge of the steam tug

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Tavistock, and, by their defence, they alleged that the *Monica*, carrying the regulation masthead, side, and stern lights, was proceeding straight down the Reach rather to the southward of mid-channel and was making about nine knots, when those in charge observed, about three-quarters of a mile distant, and bearing about ahead, but on the port bow withal, the masthead, towing, and both side lights of a tug which proved to be the *Tavistock* with six barges in tow. At this time another steamship was proceeding down the river ahead of the *Monica*, and, shortly after the lights of the *Tavistock* were sighted, the engines of the *Monica* were eased to slow and then, after a short interval, as the *Tavistock* continued to approach, the whistle of the *Monica* was sounded one short blast and her helm was ported a little. Directly afterwards the *Tavistock* sounded two short blasts, and, thereupon, the engines of the *Monica* were stopped, and put full speed astern, three short blasts being sounded on her whistle and her helm steadied; but the *Tavistock*, acting under a starboard helm, came on at considerable speed across the bows of the *Monica*, and, although she cleared the *Monica*, she caused the *C.I.V.* to strike with her starboard side the stem of the *Monica*.

The case was tried by the President, assisted by two of the Elder Brethren of the Trinity House, on December 11, 12, and 13, 1911, and, in the course of the hearing, the master of the *Monica* was asked by the examining counsel "what lights of the other vessel, other than those first seen, came into view before the collision."

[THE PRESIDENT. The answer of the defendants to this question (No. 11) in the preliminary act is "None."]

Counsel for the defendants explained that the answers of the defendants in the preliminary act followed the usual form. The answer to the previous question (No. 10) "The lights (if any) of the other vessel which were first seen" was, "The masthead towing and side lights of the *Tavistock*." No other lights could be seen, and the second question (No. 11) does not refer to changes of the lights already seen.

[THE PRESIDENT. I think that the practice is wrong.]

Counsel for the defendants urged that the practice had existed for many years.

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[THE PRESIDENT. If there is any difference in the condition or combination of the lights it should be stated, and, in the present case, the answer should have been in some such form as: Afterwards the green light was shut in, shewing the red only; afterwards the red was shut in, shewing the green only.]

Laing, K.C., and *Hugh C. S. Dumas*, for the plaintiffs, the owners of the dumb barge *C.I.V.*

Bateson, K.C., and *D. Stephens*, for the defendants, the owners of the steamship *Monica*.

THE PRESIDENT (SIR SAMUEL EVANS). This is one of those river cases which it is not easy to decide with any degree of satisfaction, and it has given me some trouble to come to a decision by reason of the totally contradictory stories on the two sides. [The learned judge then reviewed the evidence at length and came to the conclusion that the *Monica* was alone to blame, adding that:] I believe that the *Monica* was passing between a sailing barge and the tug, that she wanted to get more to her own side of the river, and that she ported, as she admits she did—but I think she ported more than she admits—and that the result of the porting was the collision which took place between her and the *C.I.V.* The case is not a very satisfactory one, but I find that the blame for this accident lies with the defendants. The plaintiffs are therefore entitled to recover, and I think the case was a proper one to be brought in the High Court.

I want to say a word about paragraphs 10 and 11 of the preliminary act. After the explanation given by counsel for the defendants as to the practice in pleading, I have not drawn any conclusion adverse to the defendants in this particular case, from the answer which was given to paragraph 11. The observation I am going to make is a perfectly general one. Paragraph 10 requires the parties to state "the lights (if any) of the other vessel which were first seen." Paragraph 11 requires a statement as to "whether any lights of the other vessel, other than those first seen, came into view before the collision." The answer of the defendants here to paragraph 10 is that they first saw "the masthead towing and both side lights of the *Tavistock*," that is

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to say, all the lights, and that is accurate. Then to the eleventh question, if it can be properly called a question, "Whether any lights of the other vessel, other than those first seen, came into view before the collision," the answer is "None." The evidence was that, having seen all four lights at first, the defendants afterwards saw only the masthead and red lights, (that is to say, the green was shut in), and a little afterwards they saw only the masthead and green lights (the red having been shut in). In a sense it is literally accurate to say that they saw no other lights, because they had seen, at the first, all the possible lights that could be seen; but I cannot believe, whatever the practice has been, that the intention was to answer in that way. I do not think the form of question need be altered, in order that my view may be acted upon. My view is that the intention in paragraph 11 was that the combination of lights should be stated. Let me just put a case. Supposing the first lights seen were the masthead and green, and that afterwards there had been seen the masthead, green, and red. I do not think that it would be right in answer to paragraph 11 to say "red" simply, it ought to be "masthead, green, and red." Illustrating it from the evidence in this case, the defendants ought to have stated that, having first seen the masthead towing and both side lights of the *Tavistock*, they afterwards saw the masthead towing and red only, and then the masthead towing and green only; that would have indicated what the situation was at various times before the collision.

Therefore, whatever the practice has been, I should like practitioners hereafter to state in paragraph 11 the lights in the sense of the combination of lights seen on the other vessel after the lights which were first seen.

Solicitors for plaintiffs, the owners of the *C.I.V.*: *Ballantyne, McNair & Clifford.*

Solicitors for defendants, the owners of the *Monica*: *Thomas Cooper & Co.*

T. L. M.

1912

April 18, 19.

THE ELYSIA.

Admiralty—Ship—Collision—Look-out—Sound Signals—Compulsory Pilotage —Assistance from Master.

The defendants' steamship, proceeding up the Mersey, ran into and damaged the plaintiffs' steamship, which was lying at anchor. The defence in substance was that those in charge of the plaintiffs' steamship improperly allowed a tug in attendance to exhibit a green light on the starboard side of their vessel, thereby leading those in charge of the defendants' vessel to believe that the plaintiffs' vessel was under way; secondly, that if there was any negligence it was solely that of the pilot in charge by compulsion of law:—

Held by the President (Sir Samuel Evans), that the defendants were liable as the plea of compulsory pilotage failed, for though the pilot was to blame for faulty navigation the blame did not rest solely with him, as the master of the defendants' vessel, who was, at the material time, on the bridge, acting as part of the look-out, had appreciated, in sufficient time, that the plaintiffs' vessel was at anchor, but had not (as required by *The Tactician* [1907] P. 244) pressed upon the attention of the pilot that he was navigating the vessel under an erroneous impression as to the meaning of the green light, which properly indicated that the tug was not attached to the plaintiffs' vessel, but was, in fact, stemming the tide whilst waiting for orders. Secondly—on the point left open in *The St. Paul* [1909] P. 43, as to the responsibility of master or pilot in respect of the giving of sound signals—that the collision might have been avoided if the defendants' master had drawn the attention of the pilot to the omission to direct the giving of the appropriate sound signals on each alteration of the helm, as the vessel at anchor would probably then have given some indication by way of warning of the danger the defendants' vessel was incurring.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *Explorer*. The defendants and counter-claimants were the owners of the steamship *Elysia*.

The case is reported in respect of the observations made by the learned President in the course of his judgment as to (1.) the nature of the assistance (indicated by *The Tactician* (1)) to be rendered to the pilot, compulsorily in charge of his ship, by a master acting, at the material time, as part of the look-out, and (2.) as to the extent of the duty of the master to secure the giving, by the pilot, of the appropriate sound signals in accordance with helm movements, a point left open in *The St. Paul.* (2)

(1) [1907] P. 244. (2) [1909] P. 43.

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THE ELYSIA.

On December 17, 1911, about 6 A.M., the weather being fine and clear, the wind southerly, moderate, and the tide half flood of from two to three knots, the screw steamship *Explorer*, of the Harrison Line, of 7608 tons gross register, manned by a crew of eighty-three hands, partly laden with a general cargo, and in charge of a duly licensed Liverpool pilot, was, in the course of a voyage from Calcutta to Liverpool, lying at anchor in the Sloyne, river Mersey, heading north with her anchor lights duly exhibited, when she was run into and damaged by the screw steamship *Elysia*, of the Anchor Line, of 6368 tons gross register, manned by a crew of 120 hands, from Bombay to Liverpool with cargo and passengers.

By their defence the owners of the *Elysia* alleged that their vessel, in charge of a duly licensed pilot, was proceeding straight up the river on the west side of the channel with a tug fast ahead, and making about two knots through the water, when white and green lights, which were taken to be the lights of a steamship under way, were seen about a mile distant and bearing slightly on the starboard bow. "The green light was"—the defendants alleged—"in fact the light of a tug fast to or attached along the starboard side of the *Explorer*. After the white and green lights were seen the helm of the *Elysia* was starboarded, and shortly afterwards the engines, which had previously been stopped, were put half speed ahead." When it was seen that the *Explorer* was at anchor the helm was put hard-a-port, the engines full astern, the starboard anchor was let go, and the tug towed off the starboard bow; but the stem of the *Elysia* struck the port bow of the *Explorer*.

The defendants, inter alia, charged those on board the *Explorer* with negligence "in wrongly allowing to be exhibited on the tug a green light in such a position as to be mistaken for the starboard side light of the *Explorer*." Alternatively, the defendants alleged that "if there was any negligence in the navigation of the *Elysia*, the same was solely that of the pilot, who was in charge by compulsion of law," and the defendants counterclaimed for the damage they had sustained.

1912. April 18, 19. *Laing, K.C.*, and *A. R. Kennedy*, for the plaintiffs, the owners of the *Explorer*.

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Batten, K.C., and *C. Robertson Dunlop*, for the defendants, the owners of the *Elysia*.

The facts, as found by the Court, and the arguments of counsel fully appear from the judgment. In addition to the cases mentioned therein the following were referred to :—*The Romance* (1); *The Devonian.* (2)

THE PRESIDENT (SIR SAMUEL EVANS). It is not necessary for me to recapitulate the evidence in this case. It will be sufficient to state the conclusions of fact at which the Court has arrived.

The collision took place between the *Elysia*, a vessel under way, travelling at about five knots over the ground and two knots through the water, and the *Explorer*, a vessel at anchor. Prima facie, therefore, an explanation must be given by the defendants, the owners of the *Elysia*, for the collision which took place. The explanation which they offer is this. They say that those in charge of the *Elysia* were misled by a green light which was allowed to remain, and improperly allowed to remain, on a tug alleged to be in attendance upon the *Explorer*. Having regard to the arguments of counsel for the defendants, I must at once consider whether or not it has been shewn in this case that the tug was made fast to the *Explorer*. The only witness produced for the defendants to establish that fact was the master of the tug *Nelson*. He said that, as he passed the two steamers, he saw at some time a rope which he thought made the tug fast to the *Explorer*. He was expecting a collision to take place between these two big vessels, and I doubt very much whether he was observing or could see whether the tug was made fast to the *Explorer*, or whether he was paying attention to anything but the collision which was impending, and which actually took place between the two vessels. On the other hand there is the evidence of the chief officer of the *Explorer*, there is the evidence of the master of the tug *Westcock*, and of her mate. Now, their evidence stands in this way. The tug would not make fast without instructions from the chief officer on the bridge of the *Explorer*. The chief officer says not only that the tug was not in fact made fast, but that he gave no instructions for making fast.

(1) [1901] P. 15. (2) [1901] P. 221.

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In the same way the master of the *Westcock* says that in fact there was no rope between the tug and the *Explorer;* and that statement is also made by his mate, at any rate up to a time within two minutes of the collision, when he went below. They further say that, before the tug would make fast, instructions would have to be given by the master of the *Westcock* to the mate to that effect. The master of the tug says "I gave no instructions to the mate." The mate says "I received no instructions from the master." Putting this evidence on the one side, and comparing it with the evidence on the other, I am bound to come to the conclusion, and I do without hesitation come to the conclusion, that the tug had not been made fast before the collision. Then counsel for the defendants went further, and argued that, even if the tug was not made fast, but was merely in attendance, at the request of the master of the *Explorer*, she ought not to have had the green light burning. Well, no case has gone as far as that, and I do not think that the argument is a sound one. She, in fact, was steaming two knots in order to stem the tide, and I have come to the conclusion, and I am advised by those who assist me, that if she were not carrying her under-way lights in those circumstances she would be carrying improper lights. I therefore decide that the tug was properly exhibiting her green light as one of her under-way lights, and that those in charge of the *Elysia* cannot properly complain of having been misled by the green light.

Now, so far as the pilot of the *Elysia* is concerned, I think the navigation of the *Elysia* was faulty, and that blame for the collision rests with the pilot of the *Elysia;* but another question, and a more difficult one to determine in this case, is whether or not the collision is solely attributable to the fault or negligence of the pilot, or whether it was contributed to by negligence on the part of somebody on the *Elysia* whose assistance ought to have been given to the pilot. The case which has gone furthest in the direction of doing away with the defence of compulsory pilotage is that of *The Tactician* (1), where it was laid down by the Court of Appeal, in the judgment of Lord Alverstone, that side by side with the principle that the navigation must be

(1) [1907] P. 244.

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entrusted, without any undue interference, to the pilot alone, there is another principle, namely, "that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out, and a well-found ship"; and Fletcher Moulton L.J. in his judgment says that "just as the pilot is entitled to the assistance of the master and crew of the ship in obtaining information as to the surrounding circumstances, so in the present case he was entitled to the assistance of the master in calling his attention to the fact that the inferences he was drawing from the surrounding circumstances were such as a competent mariner ought not to draw."

Now, in this case the question being whether the pilot was given the assistance of a proper look-out, it is necessary to consider what the look-out was. It consisted, as counsel for the defendants admitted in terms, of the chief officer on the forecastle head, of the man in the crow's nest, and of the master on the bridge. The master on the bridge formed part of the look-out on the vessel, and therefore the pilot was entitled to the assistance not only of the chief officer on the forecastle head and of the man in the crow's nest, but also of the master, who formed part of the system of look-out. With regard to the forecastle head, I do not think the plaintiffs have shewn that there was any negligence on the part of the man on the look-out on the forecastle head. I have come to the conclusion that I cannot disbelieve him when he says that at a considerable distance away—about a mile—he saw the vessel and reported her upon three occasions. It is true that he did not appreciate the fact that the light of the vessel which he saw, and which he called "the vessel ahead," was the light of a vessel at anchor. He apparently thought, as did the others,—by reason, so he explained, of the presence of the green light of the tug—that the lights he saw belonged to one ship, and that that ship was under way. What was his position in the circumstances? A man on the look-out on the forecastle head is not in as good a position as a person more amidships on the bridge to judge, with reference to the lights which he sees, whether they change their bearing to other lights or to his vessel. I think he performed his duty by reporting the lights of a vessel ahead—it is

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not his duty to go arguing with the people on the bridge, the pilot or the master, as to whether the lights which he reports are the lights of a stationary vessel at anchor or of a vessel under way. He shouted out more than once, "Lights of a vessel ahead," and I think he performed all that could reasonably be expected of him. On the bridge was a look-out consisting of the two eyes of the master himself, and he ought to be a competent mariner. It was much easier for him, if he had been careful in his examination of the lights, to see whether the white light he saw was the light of a vessel at anchor. Could a competent mariner have seen it earlier than the master did and have appreciated that it was an anchor light? Unquestionably he could, because the evidence, called by the defendants themselves, included that of the master of the tug *Nelson*, who says he knew, when he was a quarter of a mile distant, that the light of the *Explorer* was the light of a vessel at anchor. He mentioned the Wallasey stage as his position when he appreciated that fact, and that is more nearly a mile away than a quarter of a mile; but it is enough for me to say, for the purpose of my judgment, that he did know at least a quarter of a mile away, and probably at a much further distance away, that the light was the light of a vessel at anchor. If he did, the master could, and if the master could, he ought to, have appreciated the same thing much earlier than he did. Therefore I think that the look-out of the master was not as careful as it could and ought to have been; but he did, according to his own evidence, appreciate two minutes before the collision took place what the light was. The distance between the two vessels at that time was about a thousand feet. During the whole of this time the master knew that the pilot was navigating his vessel towards another believed to be under way, whereas she was in fact riding to her anchor. He knew that the pilot was navigating under a misapprehension; and in these circumstances, according to the decision in *The Tactician* (1), it was his duty to have told the pilot, "You are going, apparently, towards that vessel as if she was a vessel under way. I can see she is a vessel riding to her anchor." He did not do so. If he had done so, even two minutes before the

(1) [1907] P. 244.

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collision, I do not doubt something would have been done to alter a state of things which produced the collision, and that indeed the collision would have been avoided.

I know how difficult it is for a master to determine exactly, in the present state of the law, when he ought to—I will not say interfere but—say anything to the pilot which would seem to shew that he was interfering with the navigation by the pilot, or throwing any doubt upon the propriety of it. I appreciate to the full that it is a very dangerous thing to divide responsibility; but in this case, where the master formed part of the look-out, and where, if he had kept a careful look-out, he would have known that his vessel was approaching another at anchor long before he did, and when he did in fact know that in time to avoid the collision, I think he ought to have warned the pilot that he was under a misapprehension. I think, therefore, that the master himself in this case was in part responsible for the accident, and, therefore, the collision was not solely the fault of the pilot.

There is one other matter which I ought to mention with reference to the master. I think in the case of *H.M.S. Gladiator* (1) the point was left open whether the duty of giving sound signals rested with the master or with the pilot; but there was a very strong indication of opinion by Lord Alverstone that whosesoever duty it is to order sound signals to be given, it is the duty of the master to call the attention of the pilot to the fact that sound signals have not been given if in fact they ought to have been given. What was done in this case? There was an alteration of the helm ordered upon three different occasions, according to the story of the defendants themselves—"starboard," some distance off; "starboard" again; and again "hard-a-starboard." It may be sound signals are not often given in practice to a vessel which is at anchor, but the pilot who was navigating the *Elysia* in this case thought he was approaching a vessel under way, and, therefore, those signals ought to have been given. The master himself knew what the pilot was doing, and, notwithstanding these three different orders to the helm, he did not call the attention of the pilot to the fact that he had not

(1) *The St. Paul* [1909] P. 43.

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ordered any sound signals to be given. If sound signals had been given, what would have happened? No answer would have been given, clearly, from the *Explorer* of any manœuvre on her part; but some kind of signal could be given, and in all probability would have been given, to the approaching vessel in the form, it may be, of a succession of blasts of the whistle or by ringing her bell, that the *Explorer* was not in a position to alter her course. In that way it would have been brought to the notice of those on the *Elysia*—and very likely have been brought to their notice in time—that this vessel was at anchor. Then this collision might have been avoided.

I am clearly of opinion that the *Elysia* is to blame, by reason of the negligence of the pilot, for the collision; and, for the reasons I have given, I have come to the conclusion that the collision could have been avoided if the proper assistance had been given by the master to the pilot.

In this case, therefore, the defence of compulsory pilotage fails, and the plaintiffs are entitled to recover judgment against the defendants. The defendants' counter-claim is dismissed.

Solicitors for plaintiffs, the owners of the *Explorer*: *Simpson, North, Harley & Co., Liverpool.*

Solicitors for defendants, the owners of the *Elysia*: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

1912
April 3.

[DIVISIONAL COURT.]

THE UPCERNE.

Admiralty—County Court—Jurisdiction—"Collision"—Damage by Ship to Buoy—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.

The word "collision" in s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868, is limited to collision between ships, and, therefore, a county court has no admiralty jurisdiction in respect of damage done by a ship to a floating gas buoy.

The Normandy [1904] P. 187, followed.

Appeal by plaintiffs, the Humber Conservancy Board, in an action of damage by collision, against a decision of the judge of the Hull County Court, sitting in admiralty, dismissing their action against the defendants, the owners of the steamship *Upcerne*, on the ground of want of jurisdiction.

The case is reported on the question of the meaning of the word "collision" in s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868. (1)

The plaintiffs are, by virtue of the Humber Conservancy Act, 1907, the local lighting authority of the river Humber, and owners of the No. 9 (Anson) gas buoy stationed opposite the joint dock at Hull. The buoy consists of a cylindrical steel body with welded joints, which provides the buoyancy and acts as a reservoir for the gas. A cage-like superstructure of wood and iron is carried on the top of the gas-holder, at the apex of which is fixed the lantern and optical apparatus. The buoy is charged with shale oil gas and works continuously for a period of from three to six months. The flashing apparatus is arranged to give periods of light and darkness, being approximately two

(1) 31 & 32 Vict. c. 71, s. 3: "Any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as admiralty causes):—

. . . .

"(3.) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds."

seconds light, four seconds dark. The moorings consist of from thirty to forty fathoms of $1\frac{1}{2}$-inch cable with the necessary shackles, eyes, &c., and a mooring stone weighing about $1\frac{1}{2}$ tons.

On April 18, 1910, the plaintiffs took out a summons in an admiralty action in rem for damage by collision, and by their particulars claimed against the defendants "for damage suffered by them through the Anson (gas) float belonging to them having been fouled, broken adrift, and damaged by the defendants' steamship *Upcerne* through the default, neglect and mismanagement of the defendants or their servants," and the plaintiffs claimed 150*l*.

On the same day the defendants entered an appearance, and delivered the following notice of defence of compulsory pilotage: — "Take notice that if the collision referred to in the plaintiffs' particulars in this action was caused or contributed to by any act or default of any one on board the *Upcerne* (which is denied), the same was solely the act or default of a duly licensed Humber pilot acting in charge of the *Upcerne* within a district in which pilotage was compulsory by law."

By their statement of claim, delivered May 19, 1910, the plaintiffs alleged that the *Upcerne*, about 6 A.M. on April 10, 1910, "ran into the buoy, drove it from its moorings and damaged the buoy and its lighting apparatus whereby the plaintiffs were put to expense and loss," and they claimed "judgment that the *Upcerne* was solely to blame for the collision" and "a reference to the registrar to assess the plaintiffs' damages."

The *Upcerne* is a screw steamship, belonging to Cardiff, of 2984 tons gross register, with engines of 284 horse power nominal, manned by a crew of twenty-five hands, and by their defence, delivered July 15, the defendants alleged that their vessel was proceeding up the river Humber at a speed through the water of three to four knots, on a voyage from Rosario to Hull, laden with about 700 tons of wheat and linseed; that the tide was flood running from three to four knots, the wind light from the south-west, and the weather at times dense with fog; that when the Anson buoy was sighted and reported a little on the port bow,

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and about forty yards distant, the engines were put full speed ahead and the helm hard-a-starboard, "but the *Upcerne* with her port side abaft amidships struck the buoy a slight glancing blow." The defendants further alleged that "the *Upcerne* was navigated throughout as ordered by the pilot" and they repeated the defence of compulsory pilotage.

On May 30, 1911, the defendants' solicitors gave notice "that the defendants contend that the claim made in this action is not within the jurisdiction of this Honourable Court."

On July 10, the learned county court judge delivered the following judgment:—

This case raises a point of considerable importance as to the admiralty jurisdiction of the county court. The claim is made by the Humber Conservancy Board to recover damages for injury to one of its gas buoys by the s.s. *Upcerne*.

It is contended that although the county court would have jurisdiction to deal with an injury to the s.s. *Upcerne* caused by the gas buoy, it has no jurisdiction to deal with an injury caused to the gas buoy by the ship.

So that if the owners of the ship sue in this court for injury to the ship, the owners of the gas buoy cannot meet it by a cross-claim or counter-claim for injury to the buoy received in a collision between the two.

The question of the county court jurisdiction does not, however, depend upon what any tribunal may think convenient, but upon the words of the statutes giving admiralty jurisdiction to the county courts. The jurisdiction of the High Court (Admiralty Division) is primarily the ancient jurisdiction exercised from an early period by the Court of Admiralty, which is supplemented or defined by statute to some extent, but that of the county court depends entirely on statute.

By s. 6 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), the High Court has jurisdiction in all claims for damage received by a ship, and by s. 7 of the Admiralty Court Act, 1861 (24 Vict. c. 10), the jurisdiction is extended to damage done by any ship.

The Acts giving jurisdiction to the county courts do not in so many words give those courts jurisdiction over claims for damage

done by ships. The wording of the County Court Acts is somewhat different from that of the above Acts.

Sect. 3 of the County Courts Admiralty Jurisdiction Act, 1868, gives to those courts jurisdiction as to any claim for damage by "collision" up to the limit of 300*l.*, and that section is amended by s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, which enacts that the section is to "extend and apply to all claims for damage to ships, whether by 'collision or otherwise,'" within the limit of 300*l.*

It is clear, therefore, that if the gas buoy in question in the Humber had injured the ship in question, the county court would have had jurisdiction, whether a ship running into a gas buoy is to be called a collision or not, whilst a claim for injury to the gas buoy is only within the jurisdiction of the county court if a ship running into a gas buoy is a "collision" within the meaning of the Act.

It has been distinctly decided that a ship running into a pier or anything that is part of the land is not a maritime "collision" and does not fall within the Act, but it is contended for the plaintiffs that where the thing with which the ship comes into contact is a floating matter, such as a raft, a dumb barge, or a floating buoy, as described in this case, there is a maritime collision, a collision with something over which, apart from any statute, the old Court of Admiralty had jurisdiction.

On the other hand, it is said that collision means only collision between two ships, and that I am bound by the case of *The Normandy* (1) so to hold.

It seems to me that I have no right to say, as I am invited to do, that the decision in that case was as to a collision with something which was part of the land, a pier only, and that, although the reasoning of the judgment shews that the Court in that case did not distinguish between floating things of a maritime character other than ships and things attached to a part of the land, that that distinction ought to have been drawn.

It seems to me that I am bound loyally to follow the judgment given, and that this Court has no right to attempt to play the part of an appellate tribunal and make a distinction which the judges

(1) [1904] P. 187.

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of the High Court intentionally did not make. If such a distinction is to be drawn, it must be by the Legislature or by some higher tribunal than this. I hold myself bound by that decision to say that there is no jurisdiction in the county court.

I consider, therefore, that it is useless for me to discuss *The Zeta* (1), or the language used by Wills J. in *Robson* v. *Owner of the Kate* (2), or by Grove J. in *Hough* v. *Head* (3), or the original jurisdiction of the ancient Court of Admiralty over maritime causes.

In the present case the objection to jurisdiction was not taken, as it should have been, at once, but I am not asked to consider whether the defendants by prosecuting their defence and submitting to the jurisdiction up to a late stage could be considered to have given jurisdiction to the Court, or whether any consent could in such a case give jurisdiction (as to which see *Reg.* v. *Judge of County Court of Shropshire* (4)), but only to take the delay in making the objection into consideration on the question of costs.

I must dismiss the action on the ground that this Court has no jurisdiction to try it, and I order each side to bear their own costs, except as follows :—The plaintiffs are to be paid by the defendants the costs caused by or consequent on the delay in making the objection to jurisdiction, and the defendants are to be paid by the plaintiffs the costs of making the objection and of the hearing of it : see *Watson* v. *Petts.* (5)

If either party incurred costs in or about procuring evidence after the objection was taken those costs should, I think, be borne by the party incurring such costs, and that accordingly I order.

1912. April 3. *Bateson, K.C.*, and *Adair Roche*, for the appellants (plaintiffs), the Humber Conservancy Board.

Laing, K.C., and *Dawson Miller*, for the respondents (defendants), the owners of the *Upcerne.*

The arguments of counsel fully appear from the judgment set out above of the county court judge, and from the following judgment of the Divisional Court. All the cases cited by counsel

(1) [1893] A. C. 468.
(2) (1888) 21 Q. B. D. 13.
(3) (1885) 5 Asp. M. L. C. 447.
(4) (1887) 20 Q. B. D. 242.
(5) [1899] 1 Q. B. 430.

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for the appellants in support of the contention that the county court had jurisdiction are mentioned therein, except *The Uhla* (1); *Reg.* v. *Judge of the City of London Court* (2); *The Warwick* (3); *The Malvina* (4); and *The Sarah.* (5)

Counsel for the respondents relied on the authority of *The Normandy* (6) as decisive of the question of want of jurisdiction.

THE PRESIDENT (SIR SAMUEL EVANS). I need not recapitulate the facts in this case.

We have made up our minds as to the course we ought to adopt, and are prepared to give judgment now.

The case of *The Normandy* (6) was very much like this case, though, as counsel for the appellants have said, it is not actually on all fours so far as the facts are concerned. In that case there was a considered judgment of a Divisional Court, consisting of the then President (Sir Francis Jeune) and Gorell Barnes J. The judgment was delivered by Sir Gorell Barnes. They entered fully into the same kind of argument as was addressed to us here; and it would be quite disrespectful for us in this Court, following those learned judges, if we did not give effect to the conclusion to which they came, and which is expressed by Sir Gorell Barnes in the following passage (7): "If this matter were clear of all that has been said in other cases, the question would appear to me to be a simple matter of construction, and having regard to the object of the Act of 1868, and its general scope, and the ordinarily understood meaning of the words 'damage by collision' in the Admiralty Court, where the term 'causes of damage' is the general expression for damage cases, I should come to the conclusion that the word 'collision' referred to collision between ships. This opinion is in accordance with the cases of *Everard* v. *Kendall* (8) and *Robson* v. *Owner of the Kate* (9), and there is nothing of substance to conflict with this

(1) (1867) L. R. 2 A. & E. 29, n.
(2) [1892] 1 Q. B. 273.
(3) (1890) 15 P. D. 189.
(4) (1863) Br. & L. 57.
(5) (1862) Lush. 549.
(6) [1904] P. 187.
(7) [1904] P. 187, at p. 198.
(8) (1870) L. R. 5 C. P. 428.
(9) 21 Q. B. D. 13.

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view unless the argument based on the case of *The Zeta* (1) does so."

Now, the particular object injured in the case before us was a gas float, being exactly the same kind of buoy as came under consideration by the House of Lords in the case of *Wells* v. *Owners of Gas Float Whitton No.* 2 (2), where it was decided that an object of this kind cannot in any way be regarded as a ship. Therefore, if the word " collision " in s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, refers to collisions between ships, as stated by Sir Gorell Barnes, it cannot apply to this collision, which took place between a ship and a gas float which according to the decision cannot be regarded as if it were a ship.

In the case of *The Zeta* (1) the question arose under s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, where the jurisdiction was determined by the words " or otherwise," which appear in that section. In the case of *The Zeta* (1) and in the case of *The Normandy* (3) the second object, which the other object collided with or struck, was a pierhead. To that extent the case of *The Normandy* (3) may in its facts be distinguished from this case, but, so far as principle is concerned, I do not think there is anything to distinguish it. A pierhead is fixed. So in the material sense is a buoy. In one sense it is a floating object, but it is not intended to float here, there, and everywhere. It must float in order to be on the surface of the water, but the one purpose of fastening it in a particular place is to enable mariners to see what course to follow, and that purpose cannot be achieved unless the buoy is kept in a particular place, and is in that sense fixed. I therefore see no distinction in principle between an object of this kind, which, though floating, is affixed to the bottom of the sea in order that it may always be approximately in the same spot upon the surface of the water, and a pierhead, which is a more permanently fixed object.

In these circumstances I think we should be doing wrong if we did not follow the case of *The Normandy* (3), and I think the appeal

(1) [1893] A. C. 468.
(2) *The Gas Float Whitton No.* 2, [1897] A. C. 337.
(3) [1904] P. 187.

fails. I may add this, that in following the decision in *The Normandy* (1) we are fixing a clear line, I think, for the jurisdiction of the county courts. It will not be necessary for them to ask themselves a question as to what kind of object this or that is, with which a ship comes in contact. The line drawn for their jurisdiction in cases of collision is such that they will only have to ask themselves whether it is a collision, as described in *The Normandy* (1), between ships. I think that is the safest line to draw.

BARGRAVE DEANE J. I agree.

Appeal dismissed with costs.

Solicitors for appellants (plaintiffs), the Humber Conservancy Board: *Andrew M. Jackson & Co., Hull.*

Solicitors for respondents (defendants), the owners of the *Upcerne: Hearfields & Lambert, Hull.*

(1) [1904] P. 187.

T. L. M.

1912
Feb. 2.

THE FAIRPORT.

Admiralty—Salvage—Loss of Fishing by Trawler Salvors.

Prospective damage in the shape of loss of fishing, as distinguished from actual damage sustained by a salvor in rendering salvage services, will be recognized by the Court, but not directly taken into account in making a salvage award.

Consolidated Actions of Salvage.

The plaintiffs were the owners, masters, and crews of the steam trawlers *Diamond*, *Oriole*, and *Köln*.

The defendants were the owners of the steamship *Fairport*.

The case is reported on the question of the claim set up by all three sets of salvors for loss of profit on the fishing voyages interrupted or abandoned in order to render the salvage services.

The *Diamond* is an iron screw trawler of the port of Hull of 149 tons gross register, fitted with compound engines working up to 250 horse power indicated. She was manned by a crew of nine hands, and is of the value of 2500*l*. At the time of the services hereinafter mentioned she was on a fishing voyage in the North Sea, and it was alleged that she left the fishing grounds on November 6, 1911, in the early part of her voyage, and was not able to commence fishing again until November 19. Her claim for loss of fishing was 150*l*. The *Oriole* is a steel screw trawler of Hull of 172 tons gross register, fitted with triple expansion engines working up to about 400 horse power indicated. She was manned by a crew of nine hands, and is of the value of 5600*l*. She had left Hull on November 4 for six weeks' fishing with the Gamecock fleet in the North Sea, and it was alleged that she lost eleven days' fishing, in respect of which a claim was made of 228*l*. 9*s*. 9*d*. The *Köln* is a German steel screw trawler of Bremerhaven of 32 tons net register, fitted with compound engines of 225 horse power indicated. She was manned by a crew of ten hands, and is of the value of 3500*l*. At the time of rendering the salvage services she was on a fishing voyage in the North Sea, and claimed for loss of profit on fishing trips of fifteen days 438*l*. 11*s*. 11*d*.

The *Fairport* is a steel screw turret steamship of 3838 tons

gross register, with triple expansion engines of 316 horse power nominal, and at the time of the salvage services was on a voyage from Hamburg to Newcastle-on-Tyne in water ballast, carrying one passenger, and manned by a crew of forty-eight hands. Her value was 27,000*l.*

The nature of the salvage services rendered to the *Fairport* sufficiently appear from the judgment.

1912. Feb. 2. *Bailhache, K.C.*, and *Dawson Miller*, for the plaintiffs the owners, master, and crew of the *Diamond*.

Batten, K.C., and *John B. Aspinall*, for the plaintiffs the owners, master, and crew of the *Oriole*.

Bateson, K.C., and *D. Stephens*, for the plaintiffs the owners, master, and crew of the *Köln*.

Laing, K.C., and *R. H. Balloch*, for the defendants, the owners of the *Fairport*.

BARGRAVE DEANE J. This case has given me some trouble owing to the difficulty of making a proper award in respect of salvage and expenses.

The *Fairport* was in water ballast bound from Hamburg to the Tyne. On October 31, 1911, she started from Hamburg with 112 tons of coal on board. The master says that that was amply sufficient, because he had done the voyage in twenty-four hours, and he had sufficient for forty-eight. However, meeting with head winds, he found himself short of coal, and, the weather continuing bad, he allowed his vessel to drift. With a westerly wind she was driven towards the northern coast of Denmark. It is quite true that, although he had a lee shore, as long as he kept some coal in hand it would have enabled him in the last emergency to make for Frederikshaven, where he could get a supply of coal, or, if the wind shifted to the northward, to turn round and make for Hamburg, still he was really in a position of some nervousness, and which required great care on his part, and which he naturally thought it would be better to avoid. In the result as soon as he sighted a trawler he made signals to her, and the *Diamond* went to him.

The *Diamond* is not an old vessel by any means. She was

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built in 1907, she has engines working up to 250 horse power, and she has a crew of nine hands. She went to the *Fairport*, and established connection three times by means of her own wire warps. These do not seem to have been sufficiently strong, because they parted soon after connection was made. Why the ship's rope, a part of which was put in, was not sent out to the trawler by means of her warps I do not know, but if it had been, I think the *Diamond* might have done more good service than she did. The *Diamond* lay by all night in very bad weather, and again the next day, and did really good service, although, unfortunately, until the last day she was not able to move the vessel towards the Tyne. The *Oriole* came up next day, and she again was unable to do anything on the first day. Her rope parted, and she had to lie by all night. These two vessels, therefore, lay by on the second night. On the third day the *Köln* came up, and with the *Köln* and the *Oriole* towing ahead, and the *Diamond* on her starboard bow, the *Fairport* was eventually brought to the Tyne. There the trawlers were cast off, and the vessel went into the river under her own steam.

The weather was extremely bad on November 7, and it was bad on the 8th. It began to moderate on the afternoon of the 8th, and gradually moderated until it died away altogether, and then the wind came from the eastward. The bulk of the bad weather was borne by the *Diamond*, next by the *Oriole*, and practically very little of it by the *Köln*. Therefore, in arriving at the awards to be made to these three vessels for their services, apart from expenses, I am inclined to take what counsel for the defendants suggested as the proper view, namely, to say what would be a fair sum to award for the whole service, and then distribute it as reasonably as I can according to the services, the time occupied, and the work done.

I have arrived at the figure of 2300*l.* as the total award. Of that I give 900*l.* to the *Diamond*, 800*l.* to the *Oriole*, which is the most powerful vessel of the three, and 600*l.* to the *Köln*.

Then comes the matter of expenses. I at once dismiss the claim for prospective loss of fishing. When seamen render salvage services they abandon their ordinary occupation for the purpose of another occupation, which is salvage, and they cannot be paid

for both, although the Court will recognize the fact in making its award. I hope it will be a long time before English or German seamen will hesitate to render salvage services to vessels in distress, but they must do it with full knowledge, when they choose to do it, that they have chosen, and that they are thereby abandoning their ordinary occupation, and cannot expect to be paid for both. A salvage award is made in respect of services rendered, and we must take into account the whole story, and not separate it into two or three distinct items; but only adding the cost of actual damage sustained.

The question of damage and loss directly attributable to the rendering of the services is, however, another matter. This Court will always recognize where, in rendering salvage services, damage is occasioned to one of the salving vessels, that that has to be taken into account as actual damage. It is not like loss of fishing, which is prospective damage. In this case these vessels have proved certain damage, and counsel for the defendants do not, in fact, dispute the claim put in by the *Diamond* as set out in her statement of claim. The result is that 136*l.* represents the actual damage of the *Diamond*, and this makes her total award 1036*l.* With regard to the *Oriole*, her claim is, first of all, loss of fishing, which I disallow, extra coal—I do not allow that, because it is part of the services rendered—and provisions destroyed. That is another matter. It is loss occasioned to the owners directly by reason of the salvage, and after consulting with the Elder Brethren, they advise me that 15*l.* might reasonably be allowed. The last item is loss of trawl. I have taken the view of the Elder Brethren, and acting upon their advice I allow the whole of the damage for loss of trawl and gear. Therefore I allow the *Oriole* 74*l.* for her damage, or 874*l.* in all. Then comes the *Köln*. I disallow the claim for loss of fishing and wages. I allow 222*l.* 10*s.* 6*d.* for repairs; 24*l.* 7*s.* 4*d.* for the cable chain; I do not allow travelling expenses; I allow surveyor's fees and telegrams; I do not allow wear and tear of the engines, because I think there is no evidence to satisfy me that there was any wear and tear occasioned by the salvage services; coal I do not allow, except that I am advised by the Elder Brethren that, perhaps, while she was laid up, it might be

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reasonable to allow for a certain amount of coal being used on board, and I allow 10*l.* for that. Then comes the item "expenses, including insurance, equipment." That I do not allow. As to demurrage, it would be difficult to know what would be a fair sum to allow for demurrage while the vessel was under repair. I have to do what is reasonable, and I have allowed 100*l.*, or something under 10*l.* per day. These items which I have allowed make 367*l.* 2*s.* 5*d.* I allow 367*l.*, or 967*l.* in all. The total expenses allowed come to 577*l.*, and, therefore, the total sum awarded will be 2877*l.* This is a very much larger amount than I like, but it is chiefly made up of these expenses.

Solicitors for the *Diamond: Williamson, Hill & Co., for R. & R. F. Kidd, North Shields.*

Solicitors for the *Oriole: Stanton & Hudson, for A. M. Jackson & Co., Hull.*

Solicitors for the *Köln: Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for the defendants, owners of the *Fairport: Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on Tyne.*

T. L. M.

G. *v.* G. 1912

Nullity of Marriage—Non-consummation—No Apparent Defect—Cross-Claims for Nullity — Finding of Incapacity quoad hanc et quoad hunc — Decree Nisi—Either Party at Liberty to apply for Decree Absolute.

If the Court is satisfied that a marriage has not been, and that, as regards both the wife and the husband, it cannot be, consummated by the parties thereto, though no reason for non-consummation is manifest or apparent, it is warranted in annulling the marriage.

In such a case, the Court pronounced a decree nisi on the prayer of each of the parties, and either party was, by the terms of the decree nisi, to be at liberty to apply for the decree to be made absolute.

Petition for nullity.

Answer, admitting non-consummation, and praying for a decree of nullity.

Each party alleged that the admitted non-consummation arose through the incapacity or physical defect of the other.

The report of the medical inspectors was to the effect that the husband's parts were anatomically well formed and normal in every respect and that he was apparently capable of performing the act of generation; and that the wife was found to be virgo intacta, and that there was no impediment on her part to prevent consummation of marriage.

The hearing was in camera.

Barnard, K.C. (*Hon. Harold Robson* with him), for the petitioner (husband).

Bayford, for the respondent (wife).

Bargrave Deane J. This is a very exceptional case. It is a case in which the husband, in July of last year, filed a petition for nullity on the ground of his wife's frigidity, and in October she filed her answer denying it, and alleging that the husband was incapable and had never consummated the marriage, and asking also for a decree of nullity. Both parties have given evidence before me, and I am satisfied that this marriage never has been consummated and that the lady is a virgin. The inspectors have reported that she has no impediment as far as

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they can see. They have reported about the husband, who is a medical man of position and experience, that he is a perfectly formed man, and apparently perfectly virile and able to consummate the marriage. The husband says "I attempted and my wife refused to let me have intercourse with her." She admits he has never had intercourse with her, and she says he never made a real attempt.

The result I have arrived at is that, without being able to say whether I accept one side or the other, the fact is manifest that, so far as these two people are concerned, the marriage has not been consummated, and, in my opinion, it cannot be consummated: whether it is the fault of the man or the woman, I am not prepared to say. I see no reason to hold that either one or the other has been guilty of perjury. Their stories are absolutely inconsistent; but that is immaterial, if I am satisfied that, quoad hanc et quoad hunc, these people cannot consummate the marriage. If for some reason which is not quite clear, but in fact, the Court is satisfied that the marriage cannot be consummated, then the Court is entitled to annul the marriage and not tie the two people together for the rest of their lives in a state of misery. Therefore I am prepared to pronounce a decree in this case, not on the petition of either of them, but on the petition of both of them, leaving either of them to apply to make the decree absolute, both, if possible. I should like them to do it together, but, if one of them refuses to come to the Court, and declines to apply to make the decree absolute, the other may apply when the due time comes. Then I think I shall have done justice as far as possible. I shall not have imputed to either of them the slur of being impotent. I cannot go behind their stories of course: nobody was present and nobody can say what took place between them at the time. The stories are absolutely inconsistent, but I do not think that matters if I have arrived at the conclusion at which I have arrived, namely, that for some reason these two people cannot consummate the marriage. Therefore I am prepared to pronounce a decree nisi (1) annulling

(1) The decree nisi was in the following terms:—

"The judge having taken the oral evidence of the petitioner and respondent and of the witnesses produced on behalf of the petitioner and

this marriage, and, as I say, will allow both, or, in default of both, either, to apply for a decree absolute. 1912 G. v. G

Solicitors: *Lewis & Lewis; Burton, Yeates & Hart.*

H. D. G.

DREW *v.* DREW.

1912 *April* 22.

Divorce—Practice—"Irregular" Marriage in Scotland—Registration of Births, &c. (Scotland) Act, 1854 (17 & 18 *Vict. c.* 80), *s.* 58—*Extract from Register Book of Marriages—Marriage Law (Scotland) Amendment Act*, 1856 (19 & 20 *Vict. c.* 96), *s.* 2—*Evidence.*

A marriage in Scotland, by declaration in presence of two witnesses, duly registered pursuant to warrant of the sheriff-substitute, was allowed to be proved by the oral evidence of one of the parties to the marriage and by production of a document purporting to be certified, under the hand of the assistant registrar in Edinburgh, to be an extract of an entry in the register book of marriages kept in terms of the statute (17 & 18 Vict. c. 80).

Undefended Suit for dissolution of marriage.

The petitioner, Ann Drew, prayed for a decree of dissolution of marriage by reason of the respondent's desertion and adultery, She also asked for the custody of the only child of the marriage.

The petitioner and respondent, who were domiciled in England, were married on November 6, 1901, at 1, India Buildings. Edinburgh, in the county of Midlothian, Scotland, by declaration

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respondent in support of the petition and answer filed in this cause, and having heard counsel thereon on behalf of both parties, decreed on the day of , 1912, on the petition of both parties that the marriage in fact solemnized on the at between the petitioner and the respondent, be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the fact that the said marriage has not been consummated and that both the said parties were and are incapable of consummating the said marriage, and the said parties be pronounced to have been and to be free from all bond of marriage with each other unless sufficient cause be shewn to the Court why this decree should not be made absolute within six months from this date; And ordered that application to make this decree absolute may be made by both or either of the said parties, and that the petitioner do pay to the respondent her taxed costs."

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in the presence of two witnesses, and on the same day obtained the warrant of the sheriff-substitute, and such marriage was duly registered the same day by the registrar in accordance with the Registration of Births, &c. (Scotland) Act, 1854, s. 58. (1)

The document lodged in Court was certified under the hand of the assistant registrar to be extracted from the register book of marriages for the district of St. Giles in the city of Edinburgh.

Evidence in support of the allegations in the petition having been adduced,

Durley Grazebrook, for the petitioner. The certificate lodged in Court, coupled with the evidence of the petitioner, shews that this was a so-called "irregular" marriage, which was afterwards (in this case, on the same day) duly registered, pursuant to warrant obtained from the sheriff-substitute. The Marriage Law (Scotland) Amendment Act, 1856 (2), makes this document

(1) Registration of Births, &c. (Scotland) Act, 1854 (17 & 18 Vict. c. 80), s. 58: "Every extract of any entry in the register books to be kept under the provisions of this Act, duly authenticated and signed, by the Registrar-General, if such extract shall be from the registers kept at the General Registry Office, and by the registrar if from any parochial or district register, shall be admissible as evidence in all parts of Her Majesty's dominions, without any other or further proof of such entry."

(2) Marriage Law (Scotland) Amendment Act, 1856 (19 & 20 Vict. c. 96), s. 2: "If any persons who shall have contracted an irregular marriage in Scotland after the day and year aforesaid (December 31, 1856) shall within three months thereafter present a joint application for a warrant to register such marriage to the sheriff or sheriff-substitute of the county where such marriage was contracted, and shall prove to his satisfaction that they have been married to one another, and that one of them had lived in Scotland for twenty-one days next preceding such marriage, or had his or her usual residence in Scotland at the date thereof, such sheriff or sheriff-substitute shall certify the same under his hand, and shall thereupon grant warrant to the registrar of the parish or burgh in which the marriage was contracted, who shall forthwith enter such marriage in the register of marriages kept by him in terms of an Act of the seventeenth and eighteenth years of Her present Majesty, chapter eighty; and any certified copy of such entry, signed by such registrar, and which such registrar is hereby required and empowered to give, charging for the same the sum of five shillings, shall be received in evidence of such marriage, and of such residence or of such previous living twenty-one days in Scotland, in all Courts in the United Kingdom and dominions thereunto belonging."

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evidence in this Court, not only of such marriage, but of the previous statutory residence in Scotland.

It is submitted that expert evidence as to the law of Scotland is not required. This is a point of some moment, especially in cases where the parties are poor.

SIR SAMUEL EVANS, PRESIDENT, held that the marriage was proved, and thereupon pronounced a decree nisi, with costs, and the custody of the child.

Solicitor: *Arthur Bockett.*

H. D. G.

IN THE ESTATE OF WILLIAM THOMAS.

1912

June 10.

Probate — Practice — Administration — Outstanding Grant — Administrator abroad—Property unadministered—Small Estate—Production of Outstanding Grant and Notice to Administrator dispensed with—Revocation of Grant—Fresh Grant de bonis non.

Where an administrator of a small estate had gone to New Zealand, taking the grant with him, the Court, with the object of avoiding expense and delay in winding up the estate, revoked the grant and made a fresh grant de bonis non without notice to the administrator, and without requiring production of the original grant.

MOTION for revocation of letters of administration and for a grant de bonis non to the applicant without citation of or notice to the original administrator.

William Thomas, late of Llanelly, died on October 29, 1903, a widower and intestate, leaving him surviving nine children, all of full age, one of whom had since died a bachelor and intestate, and another had also since died intestate, leaving a widow and two children still living.

Letters of administration in the estate of William Thomas were granted on November 14, 1903, to Thomas Edmund Thomas, one of his said nine children.

In or about May, 1909, the administrator went with his family to New Zealand, where he was now permanently resident.

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A leasehold house, said to be worth about 200*l.*, and some furniture therein, said to be worth about 10*l.*, forming part of the estate of William Thomas, had not been dealt with by the administrator. The said property was not included in the Inland Revenue affidavit, in which the estate was sworn at 553*l.* 6*s.* 10*d.* gross : 527*l.* 6*s.* 10*d.* net personalty.

Most of the persons entitled in distribution consented to the present application, which was made by Margaret Hewitt, a married daughter of the deceased, who (inter alia) stated that although she did not know the full postal address of the administrator, it could be obtained, as two of the brothers, then in Canada, had been in correspondence with their brother in New Zealand, the said administrator.

W. E. P. Done moved the Court. It is desired to avoid the expense and delay of communicating with or citing the administrator, who is believed to have the original grant with him in New Zealand. The value of the outstanding estate is small. [He referred to *In the Estate of Loveday* (1) and *In the Estate of Colclough*. (2)]

SIR SAMUEL EVANS, PRESIDENT, in the special circumstances, acceded to the application, and ordered the grant to be revoked without requiring production thereof and without citation of, or notice to, the administrator ; and directed a fresh grant to be issued in favour of Margaret Hewitt, the applicant, in respect of the estate of the deceased left unadministered.

Solicitors : *Speechly, Mumford & Craig, for J. Lewis Phillips, Llanelly.*

(1) [1900] P. 154. (2) [1902] 2 I. R. 499.

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1912
June 24.

THE PACUARE.

Admiralty—Collision—Practice—Value of Sunken Lightship—Inspection of Owners' Books—Rules of the Supreme Court, Order XXXI., *r.* 18 (1.).

The plaintiffs' lightship, while at her station in the Mersey, was run into and sunk by the defendants' steamship. The defendants admitted liability, agreed to a reference, and applied for an order to inspect the plaintiffs' books with a view to ascertain the figures upon which the plaintiffs based the value they set upon their vessel:—

Held by the Court of Appeal (Fletcher Moulton and Buckley L.JJ.), reversing the decision of the Liverpool District Registrar and of Bargrave Deane J., that the defendants were entitled to an order for the production of the books forthwith, as the only material question was the value of the lightship at the date of the casualty, and it would assist the defendants if, before going to the reference, they were in possession of the figures relating to the original cost, and subsequent depreciation in value, of the lightship.

Interlocutory Appeal by defendants, the owners of the steamship *Pacuare*, in an action of damage by collision, against the refusal of Bargrave Deane J. to make an order for the inspection of the books of the plaintiffs, the owners of the lightship *Alarm*.

On August 22, 1911, the lightship *Alarm*, while on her station in Liverpool Bay, was run into and sunk by the steamship *Pacuare*. On the following day the plaintiffs, the Mersey Docks and Harbour Board, as owners of the lightship, and her master and crew proceeding for their lost effects, issued a writ of summons in rem against the defendants, the owners of the steamship, claiming the amount of the damage and loss they had sustained by the sinking of the lightship. On August 29, the defendants, the owners of the *Pacuare*, admitted liability, and on January 17, 1912, it was agreed that the action, and all matters in difference, should be referred to the Liverpool District Registrar, assisted by merchants.

The plaintiffs delivered particulars of their claim arising out of, and in consequence of, the sinking of the lightship, and, on May 21, the defendants applied to the district registrar for an order that the plaintiffs, the Mersey Docks and Harbour Board,

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should give the defendants inspection of their books shewing the value of the lightship to the Board at the date of the collision. The district registrar declined to make the order, and, on June 10, Bargrave Deane J. dismissed with costs an appeal by the defendants from the district registrar, the learned judge intimating that, as the defendants could take steps to obtain the production of the books at the reference, there was no reason for getting earlier inspection.

G. D. Keogh, for the appellants (defendants), the owners of the *Pacuare*. The plaintiffs are claiming on the basis that there is no market for lightships, and they have fixed the sum of 7047*l.* as the value of the *Alarm* to them. This sum would, presumably, be arrived at by considering the original cost, the age, the possibly obsolete pattern, and other facts relating to this particular vessel. An inspection of the plaintiffs' books would, therefore, be of material assistance to the defendants, and might save expense, as the entries would shew, before the reference, the value which the plaintiffs in the first instance set upon the vessel, together with the amount written off by them from time to time for depreciation.

[He was stopped by the Court.]

H. M. Robertson, for the respondents (plaintiffs), the Mersey Docks and Harbour Board. It is submitted that the discretion of the district registrar, and of Bargrave Deane J., was rightly exercised in refusing the order applied for. There is no practice enforcing disclosure in such circumstances as these where the application is in anticipation of a reference already agreed to, and no practical benefit would result to the defendants from an inspection of the books, the entries therein not being relevant to the present inquiry, as they deal with the varied career of the lightship, which has fulfilled various other duties for the plaintiff Board, and the entries are made for other purposes, such as the value generally of the plaintiffs' property, rather than that of arriving at a valuation of the lightship in the event of such a casualty as the present. This is, therefore, not a case in which an order for inspection will be made under Order xxxi., r. 18 (1.), of the Rules of the Supreme Court, the

discovery asked for not being "necessary either for disposing fairly of the cause or matter, or for saving costs."

FLETCHER MOULTON L.J. This appears to me to be a plain case. The plaintiffs are the owners of the lightship *Alarm*, which was run down by the defendants' steamship. The defendants admit liability, and the material question is the value of the lightship. The plaintiffs have in their possession books which contain the whole history of this vessel—its original cost, the work done on it, the depreciation which has been written off, and all the relevant facts which must ultimately guide the tribunal in deciding what is the value of the lightship. It is admitted that at the hearing the books must be produced. Why should they not be produced beforehand, to enable the defendants to be in possession of those facts before going to the reference? I cannot see why they should not, and the order must be that the books be produced forthwith.

BUCKLEY L.J. concurred.

Appeal allowed with costs here and below.

Solicitors for appellants (defendants), the owners of the *Pacuare*: *Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for respondents (plaintiffs), the Mersey Docks and Harbour Board: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.*

T. L. M.

1912

Feb. 28, 29; *March* 1.

THE BROMSGROVE.

Admiralty—Ship—Collision—Steam Vessel aground—Sound Signals—Lights—Thames By-laws, 1898, *arts.* 30, 40, 52.

The Thames By-laws, 1898, are defective in not sufficiently indicating the signals to be given, or lights to be exhibited, by a vessel temporarily aground, as a warning to other vessels to keep clear.

Action of damage by collision.

The plaintiffs were the owners of the steamship *Holywood*.

The defendants and counter-claimants were the owners of the steamship *Bromsgrove*.

The case involved the consideration of arts. 30, 40, and 52 of the Thames By-laws, 1898. The material portions of those articles of the by-laws are set out in the judgment.

On November 5, 1911, about 8 p.m.—the weather being fine, clear, and moonlight, the wind south-westerly strong, and the tide the first of the flood of a force of about two knots—the screw steamship *Bromsgrove*, of 1445 tons gross register, engines of 176 horse power nominal, and manned by a crew of seventeen hands, was proceeding, at a speed of about eight to nine knots, up Erith Rands in the river Thames, in the course of a voyage from Port Talbot to the Atlas derrick in Bugsby's Reach with a cargo of coal. She was in charge of a duly licensed Trinity House pilot, and was exhibiting two masthead, side, and stern lights, and was keeping a little to the north of mid-channel, when, in passing to the northward of a large steamship called the *Armadale*, which she had overtaken, and which appeared to be aground, she was also found to be touching the ground. She thereupon stopped her engines, and sounded four short blasts in rapid succession, repeating the signal at short intervals; but notwithstanding the warning thereby given, and (as the Court found) from inattentive look-out, she was run into by the *Holywood*, a screw steamship of the port of London, of 1546 tons gross register, engines of 214 horse power nominal, and manned by a crew of eighteen hands. She was proceeding up the river, about a quarter of a mile astern of the *Bromsgrove*, and was in charge of a duly licensed Trinity House pilot, on a voyage from

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Hull to London with a cargo of coal. She was making from nine to ten knots through the water, and was exhibiting two masthead, side, and stern lights, and, at the material time, was shaping to pass to the northward of a dredger which was at work in the upper part of the reach to the northward of mid-channel. On seeing that the *Bromsgrove* was aground the engines were stopped and reversed, but too late to avoid a collision with consequent damage to both vessels.

Laing, K.C., and *R. H. Balloch*, for the plaintiffs, the owners of the *Holywood*.

Batten, K.C., and *D. Stephens*, for the defendants, and counter-claimants, the owners of the *Bromsgrove*.

BARGRAVE DEANE J. This is a curious sort of case. At first sight art. 52 of the Thames By-laws seems to be the one to apply. It is the overtaking rule, the first paragraph of which runs: "Every vessel overtaking another vessel shall keep out of the way of the overtaken vessel which latter vessel shall keep her course," and, by art. 53, her speed. Therefore, prima facie, the *Holywood* had to keep out of the way of the other vessel. Then the other vessel by accident got aground, and was unable to keep her course and speed, and therefore one has to look to see how the other vessel when she got aground was to give notice to the vessel coming up astern of her that she was aground.

I do not think that this is properly provided for in the rules, and I think there ought to be provision made, for it often happens in the Thames that a vessel goes aground when there is very little water in the river, and she requires to indicate that she has temporarily gone aground. Very often she has not time to change her lights, and I think it would be advisable if the rules stated that she should give some particular signal to indicate that which has happened. Whether it might be by continuing to blow the whistle until the lights were got up or the vessel was got off I do not pretend to dictate, but that there should be some rule I am clear.

The *Bromsgrove*, when she found herself aground, blew four blasts, according to her story, and continued to blow them. That

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is supposed to be under by-law 40, which says: "When a steam vessel, in circumstances other than those mentioned in by-law 36, is turning round or for any reason is not under command and cannot get out of the way of the approaching vessel . . . . she shall signify the same by four blasts." Well, she was not turning round, but she could not get out of the way of the approaching vessel, though I do not think that the circumstances in this case were such as the framers of the rule had in their mind. They had in mind, I think, a steamer whose gear is out of order or whose engines are broken down, or something of that sort, and not a steamer which has temporarily run aground. Art. 30, by which a vessel of the size of the *Bromsgrove* would be required, if aground in or near a fairway, to exhibit two white lights, does not seem to apply, because I think it is meant to apply to vessels anchored or on the ground permanently near the fairway. That is not at all the same thing as this, where a vessel, owing to the lowness of the tides, has temporarily got herself on a bank.

The first thing I have to decide is a question of fact, namely, whether the *Bromsgrove* blew four blasts. Counsel for the plaintiffs called my attention to the fact that none of the witnesses called for the *Holywood* say the *Bromsgrove* sounded four blasts. I think, however, this case is a very good example of the difference between affirmative and negative evidence, and the conclusion I have come to is that the evidence of those who say "I did not hear" is not of very much value in this particular case. Did this vessel blow four blasts? It is sworn to by the master, the pilot, the chief officer, the second officer, the man at the wheel, the pilot on the *Armadale*,—who swears positively to it—the pilot's brother, and the man from the *Axwell*, who speaks of hearing four blasts from the *Bromsgrove*. That they were not heard by the plaintiffs' witnesses may be, but that is not the point. The point is did she blow them, and thereby give the notice open to her under the rules, namely, four blasts to indicate that she was not under command. I think she did. If she did you cannot impute blame to her, and if she did all that it was possible to do, then the other vessel had to keep out of her way and did not do it. It may be a hardship, but I cannot help coming to the conclusion that the chief officer on the look-out on the

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Holywood was inattentive to his duties; that the people on the bridge trusted to him and he failed them, and their attention was not directed to the whistles and they did not hear them, and they got too close before they realized that the *Bromsgrove* was there, and then had not time to clear her. That is the conclusion I have come to, and it is one in which I am supported by the Elder Brethren, on whose advice I rely. They strongly urge upon me the importance of having some new rule—and I believe new rules are being prepared—in accordance with which a vessel which gets temporarily aground in the Thames—or in any other river where these shallows exist—shall indicate her position, and it seems to me that if she keeps blowing her whistle until she gets her lights up or gets off the ground, that might be sufficient.

I ought to add a word on the question of putting up the anchor lights. You cannot put up lights in a moment. I do not know that vessels are bound to carry their lights ready lighted on deck in case of such an accident as this. It might be advisable to do so, but you have to consider what distance these vessels were apart when it first came to their notice that the *Bromsgrove* was aground. The other vessel was only something like a quarter to half a mile astern. That distance, measured by time, is not three minutes. In my opinion, assuming that art. 30 applied, there was no time between the *Bromsgrove* getting aground and the other vessel running into her for the lights to be got out, lighted, and put up to indicate that she was aground near the fairway. I do not think that any blame can be attributed to the *Bromsgrove* on that account, and I do not think the absence of the lights affected the collision.

In my opinion the whole blame for the collision must be attributed to the *Holywood*.

Solicitors for plaintiffs, the owners of the *Holywood*: *Botterell & Roche*.

Solicitors for defendants, the owners of the *Bromsgrove*: *Thomas Cooper & Co.*

T. L. M.

1912

June 24, 25.

THE BITINIA.

Admiralty—Collision—Vessel aground at Night — Lights—Thames By-laws, 1898, art. 30—Regulations for Preventing Collisions at Sea, art. 11.

So far as relates to the lights to be carried by a vessel of 150 feet or upwards in length, "aground in or near a fairway," there is no ambiguity in art. 30 of the Thames By-laws, 1898, for it may be gathered from the earlier part of the same article that a vessel of that length is required to carry two white lights at the height and in the positions indicated, nor is the article ultra vires, for, in accordance with the reasoning in *The Carlotta* [1899] P. 223, this by-law, having been duly made by local authority, excludes the operation of art. 11 of the regulations for preventing collisions at sea, by which, in the case of vessels over 150 feet in length, aground in or near a fairway, two red lights are to be carried in addition to the white lights.

Action of damage by collision.

The plaintiffs were the owners of the steamship *Otaki*; the defendants were the owners of the steamship *Bitinia*.

The case is reported on the question of the alleged ambiguity of art. 30 of the Thames By-laws, 1898. The article is set out in the judgment.

The *Otaki* is a twin screw steamship belonging to the New Zealand Shipping Company, and of the port of Plymouth. She is of 4611 tons net register, and upwards of 150 feet in length. On November 11, 1911, about 10.30 p.m., she was—whilst on a voyage from London to New Zealand with a general cargo, manned by a crew of sixty-six hands all told, and in charge of a duly licensed Trinity House pilot—lying (under circumstances detailed in the judgment) aground on the north bank in Sea Reach, river Thames, a little above the Chapman light, and heading about east-south-east. The weather was thick with rain, the wind was south-easterly strong, and the tide was low water slack. The *Otaki* was exhibiting two white lights, one forward and the other aft.

The *Bitinia*, an Austrian screw steamship of 3125 tons gross and 1968 tons net register, whilst on a voyage from Alexandria to London with general cargo, passengers, and a crew of twenty-six hands all told, was proceeding up Sea Reach to the northward of

mid-channel, making about three knots. She was in charge of a duly qualified pilot and was exhibiting the regulation masthead and side lights and a stern light, when (under circumstances detailed in the judgment) she ran into the *Otaki*, striking that vessel a heavy blow on the port side with her port anchor and port bow, and doing and receiving damage.

The plaintiffs, the owners of the *Otaki*, charged those on board the *Bitinia* with, inter alia, negligence in not keeping a good look-out, not keeping clear of the *Otaki*, and failing to stop, in accordance with art. 49 of the Thames By-laws, when approaching another vessel so as to involve risk of collision. The plaintiffs also set up compulsory pilotage by way of defence to the defendants' counter-claim.

The defendants, the owners of the *Bitinia*, by paragraph 4 of their defence alleged that the "collision was solely caused by the negligence of the plaintiffs or their servants on board the *Otaki* in not exhibiting the two red lights prescribed by art. 11 of the regulations for preventing collisions at sea (1) to indicate that she was aground, and in not ringing the bell as required by by-law 38 of the river Thames, or in not exhibiting the said lights or ringing the bell as aforesaid in compliance with the rules of good seamanship prescribed by the Thames preliminary lights and signals rule." The defendants further pleaded that "if there was any negligence in the navigation of the *Bitinia* the same was solely that of the pilot who was in charge by compulsion of law."

Batten, *K.C.*, and *W. Norman Raeburn*, for the plaintiffs, the owners of the *Otaki*.

Bateson, *K.C.*, and *C. Robertson Dunlop*, for the defendants, the owners of the *Bitinia*.

The arguments of counsel for the defendants as to the ambiguity of art. 30 of the Thames By-laws, 1898, and as to the necessity, in the circumstances of the case, of

(1) Regulations for Preventing Collisions at Sea, art. 11:

" . . . . .

"A vessel aground in or near a fairway shall carry the above light or lights" (that is a white anchor light or lights, according as under or over 150 feet in length), "and the two red lights prescribed by article 4 (*a*)."

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exhibiting two red lights in accordance with art. 11 of the regulations for preventing collisions at sea, fully appear from the judgment.

BARGRAVE DEANE J. This action is brought by the owners of the *Otaki* to recover the amount of the damage sustained by reason of a collision between their vessel and the *Bitinia*, owned by the defendants and counter-claimants.

The collision happened about 10.30 P.M. on November 11 in last year, and it took place about three-quarters of a mile above the Chapman light, on the north side of the river Thames. The *Otaki*, a big steamer drawing 29 feet of water, found that the tide was too low to let her get safely down over the shoal at the mouth of the river, and so, when she got near the Chapman light, she turned, and in turning got ashore on the north bank; and there she lay with her head to the southward and eastward. I think that was about 7.30 o'clock. The *Bitinia* was a vessel of some size, over 3000 tons, and she was coming up the river on the north side, in charge of a Trinity House pilot. It appears that he found himself too close to the Chapman light. He set a course from the Chapman light of W. by N., which, as I have laid it off, would take him pretty nearly straight to where the bow of the *Otaki* was lying out in the river. As they proceeded on the weather apparently became squally, with a rainstorm, and the pilot thought that they had better anchor, and the chief officer was sent forward with the boatswain to see that the anchor was clear, ready to let go. Before the chief officer went forward the look-out man reported green and white lights on the starboard bow, and the pilot of the *Bitinia*, who already knew that he was too far to the northward, ported his helm in order to pass that vessel, which was on his starboard bow, shewing a green light, port to port, which would take him still more into the northward, away from that centre of the river which was the best place to be in at low water. That was his initial fault. Instead of porting, in my opinion, he ought to have starboarded. But, assuming that he did not starboard, but ported, he knew perfectly well that he was going into the northward. Then he saw, and I am satisfied they were reported, the white lights of the *Otaki*, which was

lying on the north side of the river; and he ported still more, with the result that his vessel got on the ground, refused to answer her helm, and ran into the port quarter of the *Otaki*, doing damage. That is the story, and a worse story of a pilot I do not think I have ever heard.

The only question I have to ask myself with regard to the *Bitinia* is, Was the pilot properly supported by the crew? The Elder Brethren and I have discussed with some care the question whether a proper look-out was being kept, and the conclusion I have come to upon the evidence is that a proper look-out was kept on board the *Bitinia*, and that it was solely the fault of the pilot of the *Bitinia* that this collision took place. That, however, does not conclude the case, because counsel for the defendants have raised another point. They say that the *Otaki* was not properly lighted, and that she did not do what was necessary in the circumstances, she being aground, to give notice to any vessel coming up that she was in that position. In the defence they plead art. 11 of the general regulations for preventing collisions at sea, and also art. 38 of the by-laws of the river Thames. These by-laws they say are ultra vires. They make use of the Thames rules for their own case, but so far as the other side is concerned they say the by-laws are ultra vires. Now what is it that, according to the by-laws, the *Otaki* ought to have done, because for the purpose of to-day I hold that the by-laws are not ultra vires, but are binding and have been acted upon for many years. They were made under the authority of the Thames Conservancy Act, 1894, s. 191 of which provides that "The conservators may from time to time make such by-laws as to them seem meet for all or any of the purposes for which by this Act they are authorised to make by-laws, and for all or any of the following purposes, namely," for the regulation, management, and improvement of the Thames and of the navigation thereof, and "for compelling vessels on the Thames to exhibit lights." Now, if that is the case, I should say that the by-law is a perfectly good one which regulates the lights which vessels should shew at various times and in various circumstances between sunset and sunrise on the river Thames. Accordingly the conservators have made by-laws. If these by-laws are ultra vires, some other Court must decide that

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point, as, so far as I am concerned, I am of opinion that they are good by-laws.

The by-law in question is No. 30, which provides for lights to be carried by vessels when at anchor or moored. It says: "With the exceptions hereinafter named a vessel under 150 feet in length when at anchor or moored shall carry forward . . . . a white light (hereinafter called the riding light). . . . . A vessel of 150 feet or upwards in length when at anchor"—it does not say when moored—"shall carry in the forward part of the vessel at a height of not less than 20 and not exceeding 40 feet above the hull one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than 15 feet lower than the forward light, another such light." In other words, a vessel under 150 feet shall carry one light, and a vessel of over 150 feet two lights. Then there follows the exceptions: (*a*) "Where masted vessels are lying in tiers the outermost off-shore masted vessel only of each tier shall carry the riding light." I should say that applies to vessels under 150 feet. Then (*b*) "Lighters lying at the usual barge moorings in the river above Gravesend are not required to exhibit the riding light; (*c*) every steam vessel sailing vessel or lighter moored permanently head and stern in the river shall in addition to or in lieu of the riding light exhibit such light or lights as the conservators shall from time to time order or direct." This exception is not a matter of 150 feet, above or under. It says "every steam vessel," &c. That is an absolutely different class of regulation. It relates to a vessel which is permanently moored in some particular part of the river. She is to carry in addition to or in lieu of the riding light such light or lights as the conservators may in their discretion order or direct. Up to the present they do not seem to have thought it right to add any other lights, but they do reserve to themselves the right to add to the riding light any such lights as they may think necessary for vessels permanently moored in the river. Then it goes on to this paragraph in the same rule, which is in dispute: "A vessel of 150 feet or upwards aground in or near a fairway shall carry the above light or lights." The difficulty about that is that the rule only mentions vessels of 150 feet or upwards in respect of which, by the earlier part of

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the by-law in question, two lights must be carried, and therefore the word "light" is ambiguous, but with regard to a vessel —like the *Otaki*—of over 150 feet carrying two lights there is no ambiguity. It seems to me to be plain that, whether anchored or whether aground, she is to carry those two lights at particular heights above the deck and at particular distances fore and aft, to indicate that she is there, fixed and immovable. Counsel for the defendants say that, having regard to that particular paragraph, the rule is ambiguous and void for ambiguity; so that it is to be treated as a nullity, and, therefore, you are entitled to introduce the sea rule, which otherwise would not apply. They say that by the sea rule—which applies where there is no valid local rule—you must carry two red lights, and that as the *Otaki* was carrying two white lights when she was aground she is to blame also. I do not agree with them. The case of *The Carlotta* (1) has been cited, and in that particular decision, which was not quite like this because it was broad daylight and there was no question of lights, Gorell Barnes J. pointed out distinctly that the regulations for preventing collisions at sea "commence with a preliminary statement that 'These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by seagoing vessels.' It is also provided by art. 30 of those regulations that 'nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.'" Now, if that is the case, that is a precise provision in the sea rules that they shall not apply to the river Thames if there is a rule made by the proper authority, exercising jurisdiction over the river Thames, providing for the particular matter in question. In my opinion, as I have said before, art. 30 of the Thames Rules does purport to provide for the case, and that being so, you must not bring in the sea rule, which is a different rule, and would mean this, that a vessel, by the Thames rule, would require two white lights, and, by the sea rule, would require two red lights. That would be a conflict of authority and practice which would cause confusion. In my opinion the

(1) [1899] P. 223.

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contention of counsel for the defendants on the question of the articles and the lights which the *Otaki* should have been carrying cannot prevail. I think the collision was caused solely by the bad navigation of the pilot, who was compulsorily in charge of the *Bitinia*, and both claim and counter-claim will be dismissed with costs.

Solicitors for plaintiffs, the owners of the *Otaki*: *Cattarns & Cattarns.*

Solicitors for defendants, the owners of the *Bitinia*: *Stokes & Stokes.*

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Admiralty—Ship—Collision—Fog—Towage—Sound Signals—Tug fast but not towing—Regulations for Preventing Collisions at Sea, art. 15 (*a*), (*e*)—*Division of Loss—Maritime Conventions Act,* 1911 (1 *& 2 Geo.* 5, *c.* 57), *s.* 1.

In an action of damage by collision, the defendant owners of a steam vessel charged those on board the plaintiffs' steam vessel, and her tug, with, inter alia, failing to sound their whistles for fog in accordance with the regulations for preventing collisions at sea:—

Held by the President (Sir Samuel Evans), that, though the tug was attached, by a short scope of rope, to the plaintiffs' steam vessel, she was not, either in law or in fact, towing, as the time had not yet arrived for her to take the vessel in tow, and, therefore, in the circumstances, she was not bound either to give the sound signals in fog for a separate vessel having way upon her, prescribed by art. 15 (*a*), or the signals for a vessel towing, prescribed by sub-s. (*e*) of the same article, and those in charge of the plaintiffs' vessel were justified, in the interests of safe navigation, in themselves giving the appropriate signals for a vessel under way.

In the result, as both the plaintiffs' and the defendants' vessels were found to blame for excessive speed, and the defendants' vessel in addition for bad look-out, and for not stopping in accordance with the rules, the degree of fault was apportioned as one third to two thirds, with no costs on either side.

CONSOLIDATED ACTIONS of damage by collision.

The plaintiffs were James Westoll and others, the owners of the steamship *Mary Ada Short.*

The defendants, and counter-claimants, were the Sargasso

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Steamship Company (1903), Limited, the owners of the late steamship *Sargasso*.

The case is reported (A) on the question of the sound signals which may be made, in fog, by a tug in attendance and fast to a vessel but not towing, and by a vessel towed (1); (B) as to the division of loss under the Maritime Conventions Act, 1911. (2)

On April 18, 1912, about 4.30 P.M.,—the weather being foggy, the wind south-easterly light, and the tide flood about high water of little force—the screw steamship *Mary Ada Short*, belonging to the port of Sunderland, of 3605 tons gross register, engines of 310 horse power nominal, and manned by a crew of thirty hands, was, whilst on a voyage from Brake, on the river Weser, in water ballast, about a quarter of a mile to the eastward of the end of the south pier at the entrance to the river Tyne, in charge of a duly licensed Tyne pilot. She was proceeding slowly ahead, stopping at intervals, and was making about three and a half knots through the water, heading about N. b. W. magnetic. The steam tug *Triton* had a rope fast from the starboard bow of the *Mary Ada Short*, but was not towing, and had just slipped the rope, when (under circumstances fully detailed in the judgment) the *Mary Ada Short* came into collision with the *Sargasso*, a screw steamship belonging to the port of London, of 1508 tons gross register, engines of 120 horse power nominal, and manned by a crew of twenty-one hands. She was proceeding from Howdon Dock in the river Tyne to Carthagena with

(1) Regulations for Preventing Collisions at Sea, art. 15:

". . . . . .

"In fog . . . . the signals described in this article shall be used as follows viz.:—

"(*a*) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

". . . . . .

"(*e*) A vessel when towing, ... shall . . . . at intervals of not more than two minutes, sound three blasts in succession, viz.: one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other."

(2) 1 & 2 Geo. 5, c. 57:

"1.—(1.) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault . . . ."

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a cargo of coal, and, at the material time, when the two vessels came in sight of one another at a distance of about 100 yards, the *Sargasso* was heading about east, and with engines working at slow her speed was from two and a half to three knots. The fog and helm signals given by the respective vessels are set out in the judgment. As the result of the collision considerable damage was done to the *Mary Ada Short* and the *Sargasso* sank, one life being lost.

The plaintiffs, the owners of the *Mary Ada Short*, charged the defendants with breaches of art. 16 (speed to be moderate in fog), and art. 29 (seamanlike precautions), of the regulations for preventing collisions at sea, whilst the defendants, the owners of the *Sargasso*, charged the plaintiffs with breaches of arts. 15, 16, and 29 (see above) of the same regulations, and art. 20 of the by-laws for the regulation of the navigation of the river Tyne. This article deals with the mode of approaching the entrance to the river, and is set out in *The John O'Scott.* (1)

Batten, K.C., and *R. H. Balloch*, for the plaintiffs, the owners of the *Mary Ada Short.*

Bateson, K.C., and *A. E. Nelson*, for the defendants, and counter-claimants, the owners of the *Sargasso.*

The arguments of counsel sufficiently appear from the judgment. On the question as to the duty in respect of signalling of the tug *Triton*, if (as the defendants alleged) she was attached to the *Mary Ada Short* for the purpose of towing or manœuvring, the case of *The Devonian* (2) was referred to.

THE PRESIDENT (SIR SAMUEL EVANS). The collision in this case took place between two steam vessels, one the *Mary Ada Short*, proceeding on her way towards the entrance into the Tyne, and the other the *Sargasso*, proceeding out from the Tyne on a voyage to Carthagena.

The place of collision is approximately fixed by the wreck which is now visible of the *Sargasso*, the distance of which away from the south pier head is 630 yards. I believe that the vessel was pushed by the *Mary Ada Short* going full speed on

(1) [1897] P. 64. (2) [1901] P. 221.

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her engines, and—acting very wisely in the circumstances after the actual collision—she did that in order to keep her bows in the wound, whereby to prolong the very short period during which the vessel remained afloat, so that the lives might be saved, and fortunately all the lives were saved except one, who apparently in some way was overlooked.

A good deal of evidence has been gone into as to the courses of the two vessels and as to the angle of the blow. This Court seldom gets much assistance from the consideration of the angle of the blow, because it often happens that very experienced men on the one side say the angle was a small one, and very experienced men on the other side persuade themselves that in that particular case the angle was a broader one. There is, however, one matter not in dispute, and that is that the *Mary Ada Short* entered the hull of the other vessel to the extent of about 7 feet 10 inches on one side of the *Mary Ada Short's* bows, and 5 feet 3 inches on the other.

The *Mary Ada Short* was the larger vessel, and was in water ballast; the other was the smaller vessel, but was fully laden with coal on her outward journey. I have come to the conclusion that it is more important in this case to consider carefully the speeds of the two vessels, and the look-out of the two vessels, than the courses or the angle of the blow.

The defendants are attacked by the plaintiffs, first of all, for a deficient look-out, and in the next place for excessive speed. These really are the two material allegations which are made by the plaintiffs against the defendants. The defendants, on the other hand, retort against the plaintiffs, and counterclaim against the plaintiffs, on the ground that the speed of the plaintiffs' vessel was excessive, and on the ground that the signals given by the plaintiffs, and by the tug in attendance on the plaintiffs' vessel, were not the appropriate signals. So far as the defendants' conduct is concerned, I have come to the conclusion that their look-out was bad—whatever the reason for that may have been—in the result there was not the careful look-out there ought to have been on that vessel, either by the look-out man, the mate—a young man of twenty-three—on the forecastle head, or by the master, who remained on the bridge after the pilot left.

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I accept the account which is given of the various signals by the witnesses for the *Mary Ada Short*, and I was impressed by the character of the evidence given as to the conduct of the vessel in the fog, particularly by the account given by the master of the tug. It appears that she passed two steamers before anything was known or heard of the *Sargasso*. Various whistles were given by these two steamers—about three each, I think—fog whistles, and, when those whistles were heard, the *Mary Ada Short* stopped her engines. The first steamer was seen, and thereafter she proceeded on her way; the second steamer was heard—she was not seen—but when her signals were heard I think the *Mary Ada Short* again stopped her engines, and kept them stopped until she was satisfied that the sound signals of the second steamer were abaft the *Mary Ada Short's* beam. That shews, if it is an accurate story,—and I am accepting it—that the navigation of this vessel—apart from the question of speed—when she heard those sound signals was careful navigation, and it shews not merely that those on the look-out were attending to the signals which could be heard, but it shews also that they were taking the appropriate steps when those signals were heard.

So far as the *Sargasso* is concerned, two long blasts were heard about the same time, proceeding from about the same direction, and they were regarded as two different blasts, one blast coming from one steamer and another blast from another steamer. There is some doubt about it in the minds of some of these people, but I think almost every one of them said that there was some difference in the sound, and the probability is that one long blast of those two which were first described came from the *Sargasso*, and the other was a blast of another steamship now known to have been in the neighbourhood. These were reported and answered with a long blast from the *Mary Ada Short;* then there was another report, and there was an answer given by the *Mary Ada Short* of a long blast; then the tug was ordered round from the starboard bow to the port bow, with the accompanying hail from the bridge to get on to that side, so as to hold the head of the vessel straight, as her engines would be put astern. The tug thereupon blew a signal—the first signal which the tug gave—and the signal was a long blast. I think it was not unreasonable

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for the tug to give that blast in the circumstances. I do not know that there was any obligation on her; whether that be so or not, this signal was properly given, she was moving then, so to speak, independent of the *Mary Ada Short*, and it was an indication to anybody that some steamer possessing a syren was in the locality, and was giving a signal for fog. Immediately that was done the three short blasts were given on the *Mary Ada Short*. I have said the very object of sending the tug from the starboard side to the port side was that she should prevent the vessel canting her head when going astern, and I believe in the circumstances that those three whistles were given.

Now comes the question which it is important to determine here. At this stage, according to the evidence of the *Mary Ada Short*, the vessels came into view, and, after the vessels came into view, the account given by the plaintiffs' witnesses is that the *Sargasso* gave two short blasts—that is, a starboard helm signal—and it is admitted by the *Sargasso* that she did give a starboard helm signal at some time, and that she did order and put the helm to starboard; but did the *Sargasso* give the starboard helm signal first, before two short blasts were given from the tug? The evidence from the defendants is that it was the tug which first gave the two short blasts, and that it was in answer to the starboard helm signal from the tug that the *Sargasso* gave her starboard helm signal. I have come to the conclusion that that account is not accurate, and that the first starboard helm signal was given by the *Sargasso*, and that it was then that the tug, having slipped her rope, gave her two blasts. The other signal—the only signal left—was the three short blasts again given on the whistle of the *Mary Ada Short*. It is said that that signal was not the appropriate signal for two reasons. Counsel for the defendants say, first of all, that the tug was towing this vessel, and that although the *Mary Ada Short* need not have given any signals at all, yet if she gave signals as she did, she gave wrong signals, and the only signal she ought to have given was a signal of a prolonged blast followed by two short blasts, being three blasts in succession, under the sub-head (*c*) of art. 15 of the regulations for preventing collisions at sea. They also say that that article

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applies to the tug, and that the tug was in fault for not blowing any signal at all appropriate in these circumstances, and that the plaintiffs are responsible for that omission on the part of the tug.

The articles with reference to the signals to be given in time of fog are difficult to follow, and I can quite conceive that the signals themselves may be misleading, because one particular signal is a signal for three different situations—three different manœuvres. But for the purpose of this case I hold that, in fact, the tug was not towing the vessel. It may be a question of mixed law and fact; if so, I hold in law and I hold in fact that the tug was not towing—that the vessel was not being towed. The tug had gone out to sea in order to deliver some message to this vessel, and she accompanied the vessel on her way back, intending to be her tug when it became necessary to tow her along. In these circumstances a rope was passed from the vessel to the tug, the scope of which was about fifteen fathoms, and I find in fact that there was no towing at all by means of that rope during any times material in this case, and that the point of time had not arrived when it was intended that these vessels should become a tug and tow. That being so, I do not think that the sub-head (*e*) of the article is applicable. It is said that if that be so, then the tug was a steam vessel having way on her, and ought herself to give the appropriate signals, which in this case would be one long blast on her syren. I doubt very much whether, in the circumstances of this case, the tug is to be regarded as a separate vessel requiring separate signals; but whether that be so or not, I am clearly of opinion—and I have taken careful advice from the Elder Brethren who are assisting me in this case—that from the point of view of navigation—safe navigation—warning to others, it would be less confusing for the vessel to give the signals she did, unaccompanied by any signals by the tug, than for the tug to have sounded signals as if she were a separate vessel, having way upon her. In any event, I have come to the conclusion that that omission on the part of the tug—if it be an omission—did not in any way contribute to the collision in this case.

The next thing to consider is how these signals, which I have

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found were given in this way from the *Mary Ada Short*, were observed or heard by the *Sargasso*, and how such signals as were observed on the *Sargasso* from the *Mary Ada Short* were acted upon. I have said that I have come to the conclusion that the look-out on the *Sargasso* was bad. The sounds which ought to have been heard were not heard, and blasts from the *Mary Ada Short* ought, in the circumstances, to have been heard both on the forecastle and on the bridge. Some sounds of craft in this fog were heard, as is admitted, without any action at all being taken by the *Sargasso*. One or two, if not more, vessels' signals were reported and heard, but there was no order to stop the *Sargasso*. That is a breach of the rule, and if the *Sargasso* had heard, as she ought to have heard, the signals given from the *Mary Ada Short*, she would have stopped before she did. Only two reports were given from the forecastle head; one was a steamer's whistle on the starboard bow, and the other, I think, was given very shortly afterwards, "There is the vessel." Those are the only reports given from the forecastle head. The look-out did not therefore report the sounds which he did hear, and he ought to have heard more. The account given by those in charge of the *Sargasso* in respect of the signals is inconsistent with the account given by the master in his deposition before the Receiver of Wreck.

Now comes the question whether the speeds of the vessels were excessive. I have come to the conclusion with regard to both that the speed was excessive. With regard to the defendant vessel, the *Sargasso*, their pleaded speed is two and a half to three knots at the time when the other vessel was first heard. Comparing that with the times given and the distances run from the pier head, which is a fixed point, and the place about 630 yards away, which is also a fixed point, I have come to the conclusion that the speed on this vessel was certainly over four knots. After she stopped, that speed, of course, became lessened, but the speed does not run off from the vessel all at once. With regard to the *Mary Ada Short*, her speed spoken to by her master was three knots; that is probably a smaller speed than she had a good deal, and in this regard, apart from the angle of the blow, I have come to the conclusion, from the nature of the wound,

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that the speed at which this vessel was going was a good deal more than he says. If vessels could only see each other at a distance of 100 yards and if they had to be under way at all, they ought to proceed as slowly as they possibly can. It is impossible to say what the speed ought to be in figures in every case, but it is obvious, if a vessel is proceeding at a speed which would not allow her to pull up in something like her own length, in the circumstances of this particular afternoon, and if a vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have gone at that speed, and in so far as that speed was exceeded it was excessive.

I think in this case I ought to distribute the fault between the vessels in different degrees—in proportion to the degree in which each vessel was in fault—and having come to the conclusion that there was fault by reason of excessive speed on one vessel, and having come to the conclusion that the conduct of the other vessel was a good deal worse, including excessive speed, I think that the liability to make good the damage or loss in this case must be in proportion to the degree in which each vessel was at fault, and I find that the *Sargasso*—if the fault was as to three thirds—must bear two thirds of the blame, and that the other third of the blame attaches to the *Mary Ada Short*. That means, I suppose, that the degree which each vessel was in fault was that the *Sargasso* was twice as much at fault as the *Mary Ada Short*.

In respect of costs, I make no order, so that each party will bear their own costs.

Solicitor for plaintiffs, the owners of the *Mary Ada Short*: *Charles E. Harvey.*

Solicitors for defendants, the owners of the *Sargasso*: *Lowless & Co.*

T. L. M.

WOLTERECK *v.* WOLTERECK AND WALTERS.

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July 9.

Divorce—Husband's Petition—Former Suit by Wife—Cruelty and Adultery proved—Condonation—The Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *s.* 31—*Discretion of the Court—Decree Nisi.*

The discretion conferred upon the Court by s. 31 of the Matrimonial Causes Act, 1857, is to be exercised according to the facts and circumstances of each particular case, and no strict rules ought to be laid down, fettering the discretion conferred upon the Court by that section.

Where a husband (respondent in previous proceedings) had been found guilty of cruelty and, after his wife had left him, of a single act of adultery, and these offences had been condoned by subsequent cohabitation, the Court granted the husband a decree nisi in a suit instituted by him on the ground of the wife's adultery.

THIS was the hearing of an undefended petition for divorce on the ground of the wife's adultery with the co-respondent.

The petition was dated March 22, 1912. In it, Herman Charles Woltereck, the petitioner, alleged that he was married to Nina Isobel Margaret Woltereck, the respondent, at Westminster Cathedral, on November 18, 1905, and that they afterwards cohabited at divers places and lastly at 103, Regent Street, London, there being no issue of the marriage.

The petitioner alleged that on March 20, 21, and 22, 1912, at the De Vere Hotel, South Kensington, the respondent committed adultery with George Walters; and, further, that on divers occasions in the month of March, 1912, at 103, Regent Street, London, and elsewhere, the said Nina Isobel Margaret Woltereck committed adultery with the said George Walters.

Paragraph 5 of the petition alleged that the "petitioner is now resident at" an address (named) in Pimlico, "and is a consulting chemist; and the said Nina Isobel Margaret Woltereck is now resident at the De Vere Hotel" aforesaid, "and that both of them are domiciled in England."

Paragraph 6 was as follows: "That there have been no proceedings previous hereto instituted in this Honourable Court by your petitioner; but the respondent filed a petition for dissolution of marriage against the petitioner upon the 17th February, 1908, wherein a decree nisi was pronounced on April 30th, 1908, which

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decree was, however, subsequently rescinded and the said petition dismissed upon the intervention of the King's Proctor."

There was a claim for damages of a moderate amount, but this was withdrawn in the course of the case, which thereafter was heard without a jury.

P. Rose-Innes, for the petitioner. Under s. 31 of the Act of 1857, the matter is purely one for the discretion of the Court, and each case must rest upon its own particular facts.

[SIR SAMUEL EVANS, PRESIDENT. Do you know of any case where a man who has been found guilty of adultery and cruelty has been held entitled to relief?]

There has been no such case as this. [He referred to *Story* v. *Story and O'Connor*. (1)]

SIR SAMUEL EVANS, PRESIDENT. I deprecated recently the laying down of any fixed rule in these cases. You do not put your case on the only possible ground upon which I could help you, namely, that the wife has condoned the adultery and cruelty of her husband.

[The President then referred to *Anichini* v. *Anichini*. (2)]

The petitioner was then recalled, and, in answer to the President, he said: Between July, 1909, and December, 1911, there was intercourse, though we were not living together. From Christmas, 1911, to February, 1912, we lived together as man and wife. In July, 1909, I was invited to dinner by her people, and my wife came there to dinner quite unexpected by me. It was her sisters who suggested that I should make friends with my wife. She herself said we had better let bygones be bygones. The two specific charges of cruelty in her petition were in June and July, 1907, and I lived with her afterwards, until about the end of November of that year, when she went to Switzerland. My adultery was after she had left me. It was not premeditated. I met some one whom I knew in Brighton. My wife never made any reference to my adultery after I resumed cohabitation with her.

(1) (1887) 12 P. D. 196. (2) (1839) 2 Curt. 210.

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SIR SAMUEL EVANS, PRESIDENT. I believe that the petitioner in the present proceedings has given a straightforward and honest account of the matters of difficulty in which the Court has now to give a decision.

The first of these persons to commence proceedings in this Court was the wife. In her petition, which was filed on February 17, 1908, she alleged one specific act of adultery and two specific acts of cruelty. That petition was undefended, and I daresay at that time, after quarrels between husband and wife, the husband was not unwilling to obtain his freedom, even though obtained at his expense and upon allegations made against him. That does not change the character of the act, but I do point out that the only act of adultery alleged and proved was committed by the husband after the separation which had taken place between husband and wife.

After that, there was superadded, as is not infrequently the case, a charge of cruelty upon what would appear to be somewhat slender grounds, so far as I can see. A decree nisi was pronounced in the suit, and therefore I must assume that there was sufficient evidence, in the absence of any defence, to satisfy the judge who heard the case, both as to the adultery and cruelty.

That decree nisi was not made absolute owing to the intervention of the King's Proctor; and, assuming that his allegations were proved, it appears that in 1907, and in 1908, while the case on her petition was ripening for hearing, the wife was living in a state of adultery with a person who was named in the King's Proctor's plea, but who is not the present co-respondent.

Those facts being brought by the King's Proctor to the knowledge of the Court, the judge had no alternative but to rescind the decree nisi and dismiss the wife's petition.

The situation then, in December, 1908, was, therefore, that the two parties were left as husband and wife, though not living together.

In July, 1909, a meeting was arranged, apparently by the wife's people, and, as a result of that meeting, the husband and wife came together more or less: that is to say, she was maintained by him; he visited her; and, as he says now, they resumed conjugal relations.

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At Christmas, 1911, they went to live together under the same roof, and they lived at a flat in Regent Street as husband and wife until February 3, 1912, when she went to Monte Carlo at her own suggestion and with his consent, though, so far as he was concerned, he had no intention that the state of cohabitation should be permanently put an end to. He was kind to her and provided her with considerable sums of money.

It is not surprising that this lady fell again at Monte Carlo.

I must consider what was the effect of the resumption of conjugal relations in and after the summer of 1909, and particularly the renewal of cohabitation from Christmas, 1911, to February 3, 1912. She completely forgave her husband. It was a full condonation by the lady. That is the result, fairly looked at. Supposing, after she went to Monte Carlo, and, not having been guilty of any matrimonial offence herself, she had been minded to bring a suit for divorce against her husband, founded on his former cruelty and adultery, she would have been met by the condonation, which would have constituted a complete bar. Therefore, so far as she is concerned, the state of things between her and her husband is as if no matrimonial offence had ever been committed by him.

In the present case, the adultery of the respondent with the co-respondent Walters having been proved, the only difficulty I have is as to exercising the discretion conferred upon the Court by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31. In my view, each case must be dealt with on its own merits, and no strict rules ought to be laid down, fettering the discretion conferred upon the Court.

I have considered all the cases which have been decided. They are useful as illustrations. I do not think I am contravening any satisfactory or settled principle in deciding as I am going to do.

Had it not been for the condonation, I should not have given this petitioner a decree. But, as there was that condonation by the wife, and as the petitioner has since behaved well to her and has been guilty of no fresh act of misconduct, I think I am acting justly, and in accordance with the power conferred upon

me, by exercising my discretion in his favour and giving him the decree which he seeks.

Solicitor for petitioner : *G. R. Cran.*

H. D. G.

ADDENDUM TO WOLTERECK *v.* WOLTERECK.

NOTE.—The case of *Brooke* v. *Brooke* (*the King's Proctor shewing Cause*), reported, at an earlier stage, at p. 136, ante, came before the Court for hearing, the counsel and solicitors being the same as before. The case of *Wyke* v. *Wyke* (*the King's Proctor shewing Cause*) ([1904] P. 149) was cited by counsel for the King's Proctor as very similar, though not so favourable to the present petitioner's case, inasmuch as, in the present instance, the petitioner had a good home with her parents, and there was nothing to shew that her misconduct was conduced to by the respondent, her husband.

July 26. SIR SAMUEL EVANS, PRESIDENT, in the course of his judgment, said: I may say generally that I am satisfied with the truthfulness of the petitioner and with the substantial accuracy of the account she has given of her extremely unhappy matrimonial life. It follows from this, that I find she was treated very badly by her husband. She has proved cruelty of almost every description: cruelty of the ordinary kind, if I may so term it, namely, threats and assaults, putting her in fear by reason of threats to commit suicide and indeed of actual attempts to commit suicide; cruelty arising out of desertion; cruelty arising from a callousness as to whether she was provided by him with the decent necessaries of life; and cruelty of the extreme kind, namely, communicating to her wilfully a loathsome venereal disease. Desertion has already been proved, when she obtained her decree nisi; and it is quite clear that that finding was right. He boasted that he was going to desert her and that he was going to behave in such a way that if she wanted to get rid of him she should not be able to find him or to prove her case, by reason of the expense.

She afterwards meets a young man and falls a victim to his courtship in June, 1909. She had been left, so far as her husband was concerned, entirely unprovided for. It is true her parents had a home, but she was left without a husband's protection. What her husband had done, and had neglected to do, was calculated to reduce to a very low level her ideas of the proper standard of morality in the matrimonial state.

I think that in a large measure his conduct did conduce to hers, if it is necessary to say so; at any rate, but for his misconduct her own misconduct would never have happened. But, in my view, a finding of actual conducing is not necessary to found the exercise of my discretion.

The discretion conferred by the Act was, in my opinion, intended to be unfettered; though it should, no doubt, be exercised not capriciously but cautiously and carefully, and, as far as possible, consistently, not only in regard to the parties themselves, but also with reference to the interests of

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public morality, and of decent society, which is a consideration that must not be forgotten.

So far as the petitioner's own conduct is concerned, she has only fallen with the one man; and she then found herself in a condition of pregnancy by him. Being of respectable parentage, and having the sensitiveness of a delicate woman in that condition, she left her parents' home, and this man gave her his protection until her child was born, remaining with her from December to March.

She confided then in her mother, and thereafter every association of an improper kind with the man ceased. Subsequently she brought her suit, probably with a view to marriage with the man if she obtained her freedom, a marriage which she says will take place if she becomes free. In that suit, she did not disclose the fact that she had fallen a victim in the way now made known through the intervention of the King's Proctor. Non-disclosure of misconduct by a petitioner is a serious matter. It may mean the practising of deceit on this Court, and it is quite right that the Court should give great weight to the circumstance that, in the first instance, the petitioner did not make a full disclosure of all the material facts. But, in this case, I am satisfied with the explanation now given. If the petitioner had informed her solicitors of her misconduct and had been told by them, upon such information, that she ought to disclose it to the Court, and had refused to do so, that would have been quite different. But her story is quite consistent with the fact that she kept the knowledge of her misconduct and her misfortune from her solicitors and indeed from every one of her relatives except her mother; and she has stated, as I believe honestly, that she was not aware that she ought to have informed her solicitors. There was, therefore, no attempt to deceive the Court.

I agree with the view expressed by Sir Francis Jeune that the discretion conferred by s. 31 was given to this Court without any limitation; and it would, in my opinion, be a great pity, if not a grave reflection upon our jurisprudence, were I bound, through any fetters upon the general discretion conferred by the Act, to rescind the decree in this case. The decree nisi will accordingly stand; and the petitioner may apply, in the usual way, to have the decree made absolute.

The King's Proctor must, however, have the costs of his intervention.

H. D. G.

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July 29, 31.

Admiralty—Ship—Collision—Application of Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 9, *sub-ss.* 2, 3; *s.* 4, *sub-s.* 1—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4.

By s. 9, sub-s. 3, of the Maritime Conventions Act, 1911, the provisions of the Act "shall be applied in all cases heard and determined in any Court having jurisdiction to deal with the case . . . ."; but, by sub-s. 2, the Act "shall not apply in any case in which proceedings have been taken before the passing thereof . . . ."

Held by Bargrave Deane J., that the Act applied to an action of damage by collision, in which the proceedings had been (as in the case before the Court) taken after, though the cause of action arose before, the passing of the Act, and, therefore, the statutory presumption of fault, arising under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, could not be invoked, as it had been abolished by s. 4, sub-s. 1, of the Maritime Conventions Act.

Action of Damage by Collision.

The plaintiffs were the owners of the steamship *Gripfast*.

The defendants were the owners of the steam tug *Enterprise*.

The case is reported on the question whether the Maritime Conventions Act (passed December 16, 1911) applied, so as to get rid of the statutory presumption of fault arising under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, where the collision took place before, but proceedings were not taken until after, the passing of the Act. The material sections of the Act are set out in the judgment. The writ in the action was issued on January 24, 1912.

On November 23, 1911, about 7.30 A.M.—the weather being fine and clear, the wind light, and the tide flood of from three to four knots—the screw steamship *Gripfast*, of the port of Newcastle-on-Tyne, of 1109 tons gross register, 225 feet in length, with engines of 164 horse power nominal, manned by a crew of sixteen hands, and bound from Poole to Goole in ballast, was in Goole Reach of the river Ouse, in charge of a duly licensed Ouse pilot. She had turned round head to tide below the steamship *Brenda*, which was aground on Goole Ness, and, having passed her, was dredging up in about mid-channel with her starboard anchor down, and about twelve fathoms of chain paid out, when she was struck on the port side, about amidships,

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by two barges in tow of the *Enterprise*, a steam tug belonging to the York Corporation, of 70 tons gross register, engines of 50 horse power nominal, manned by a crew of four hands, and bound from Hull to York, with four laden barges in tow in two lines, of which the *Dora* was the leading barge, and the *Speculator* the second barge on the port hand.

According to the plaintiffs, the *Enterprise* passed round the stern of the *Brenda*, apparently shaping to pass along the port side of the *Gripfast*, which vessel ported to give the *Enterprise* as much room as possible, but the lighters in tow of the *Enterprise*, having apparently got caught in the eddy under the *Brenda's* stern, were observed to sheer, and the *Dora*, and afterwards the *Speculator*, with their port bows came in contact with the *Gripfast*, doing considerable damage. Although the port anchor of the *Gripfast* was let go she fell against the steamship *Aire*, receiving further damage. Just before the collision with the *Dora* the engines of the *Gripfast* were given a touch astern to ease the blow.

Those in charge of the *Gripfast* did not give the appropriate whistle signal when they ported, or when they went astern, and it was urged on behalf of the defendants that, by reason of this omission, the *Gripfast* must be "deemed to be in fault" under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 419, sub-s. 4.

On the other hand, it was contended, on behalf of the plaintiffs, that the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), applied to the case, as the date when the proceedings were commenced was after the passing of that Act, by which (s. 4, sub-s. 1) the statutory presumption of fault, arising under the provisions of the Merchant Shipping Act, is abolished.

1912. July 29, 31. *Laing, K.C.*, and *R. H. Balloch*, for the plaintiffs, the owners of the *Gripfast*.

Bateson, K.C., and *John B. Aspinall*, for the defendants, the owners of the *Enterprise*.

BARGRAVE DEANE J. [After commenting on the unsatisfactory nature of the evidence given by the master of the defendants'

tug, the learned judge continued:] I find this to be the true state of things. The *Gripfast* was making for Goole Dock, and when she got to Goole Reach, somewhere opposite the green light, of which we have heard so much, it is clear that she adopted the ordinary rule of navigation in that part of the river. She turned under port helm, dropped her anchor, and dredged up with her anchor under her foot, making for the portion of the river above Goole Dock. In that position there was on her port side, as she dredged up, the *Brenda*, a vessel which was ashore on the east side pretty well at right angles to the river, with her stern out in the river.

The *Gripfast*, dredging up, saw coming up the river on her port bow the defendants' tug, the *Enterprise*, with four lighters in tow, and it is important to remember that it is the fact in this case that the four lighters were two abreast. There was a scope of about fifteen fathoms of line out from the stern of the tug to the leading lighters, and of ten fathoms between the leading lighters and the after lighters. Therefore the total length of the tug and tows was over 380 feet. That is important to remember. It is not like the river Thames, where you have short tow ropes. These long tow ropes of course rendered the navigation of the lighters more difficult. It is agreed that they each had a rudder, and I suppose they had rudders of some size, because it is no use having a rudder on lighters of this description unless it is a broad one.

The tug *Enterprise*, coming up, blew a port-helm signal. It does not appear quite where she blew that signal, and it does not matter much. She blew it to denote that she was porting her helm, which would head her in towards the *Brenda*. Any ordinary man who knew that water or any water with a tideway would know that there must be a swirl off the starboard quarter of the *Brenda* as she lay ashore, setting out towards mid-channel. I find as a fact that the *Gripfast* continued to dredge up until she got four or five lengths up river from the stern of the *Brenda*. I do not believe the story of the tugmaster that the collision took place off the *Brenda*—it is in conflict with all the other evidence in this case—but I do believe it took place, as I have said, four or five lengths up river—150 yards above the *Brenda*. The

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Gripfast continued to dredge, and the tug, going at full speed past the *Brenda*, felt the swirl of the tide, but she managed to avoid it. She had motive power of her own, which enabled her to do that, but the two sets of lighters, with the long scope of rope, would feel this swirl and would be shot across towards the middle of the river. That is what happened. They were shot across towards the *Gripfast*, and the tug, continuing at full speed, would take them still further on and cause the collision just about where the plaintiffs' witnesses say it occurred. In my opinion the master of the tug was a daring man. He was in a hurry, and he seemed to think that everybody ought to give way to him, and that he would make a push for it. He took the risk. He ought to have known the dangerous risk he was taking. Whether he shut his eyes to it I do not know, but he took the risk, with the result that the accident happened in the way I have described.

I am advised by the Elder Brethren that, although possibly the master of the tug could not have stopped his engines altogether for any length of time, he might have eased down and kept a light strain on the tow rope, which would have made a difference of a minute and a half to two minutes perhaps; and if so he might have succeeded in getting through. The facts are against him. By keeping his engines going full speed ahead he got his vessel into the particular place at the particular time where the circumstances caused this accident to happen. If he had been a minute later, he would not perhaps have been taking his lighters into collision. It was due entirely to the stubborn determination of the tugmaster to run the risk and try to force his way through a difficult place without taking into account the danger involved.

On the other side it is said that the *Gripfast* ought to have given notice that she was going astern, and ought to have given notice that she had ported her helm at that particular time. I do not think that is upheld by the evidence. I think the porting of the helm was done at the last moment, and that the putting of the engines astern was done at the very last moment, when the collision was inevitable, and that there was nothing done on the part of the *Gripfast* which could by any possibility have caused this collision or contributed to it.

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Under the old state of the law I should have had to say that, as the master of the *Gripfast* ported and reversed without sounding the proper whistle signals, he was to blame for not blowing his whistle. The Court of Appeal have been very strict in the line which they have taken, and the Legislature seems to have thought that they had been too strict. It has taken away that arbitrary rule, and has left the Court to follow what is a reasoning judgment, and to say, "Did this want of obeying the regulations in any way contribute to the collision?"—not, "Might it possibly have done so?"

In my opinion, and the Elder Brethren so advise me, the porting and reversing could not by any possibility have contributed to the collision. It was broad daylight, and everything was open to the eyes of the tugmaster. He saw and knew exactly what was going on, and he has come here and deliberately told us what was untrue, about the *Gripfast* being right athwart the river and going astern and getting into his way. If his story were true it might be so, but I do not believe it, and I think he and his friend from the quay have deliberately tried to mislead the Court. I am of opinion, therefore, that the failure of the *Gripfast* to blow "port helm" and "going astern" signals had nothing whatever to do with the collision, which was inevitable from the time the tugmaster determined to force his way through between the *Gripfast* and the *Brenda*.

I must now say a word about the Maritime Conventions Act. I can only read that Act literally. I do not import words into it, or say that direct language would mean anything else. Sect. 9, sub-s. 2, is as follows: "This Act shall not apply in any case in which proceedings have been taken before the passing thereof, and all such cases shall be determined as though this Act had not been passed." It is perfectly plain language. It does not say "to any case in which the facts occurred before the passing of the Act," but "proceedings have been taken." Counsel for the defendants asked me to read into that "in which the facts of the case happened before the passing of the Act." Why the Legislature dealt with it in that way it is not for me to say, but the words are so plain that there cannot be any doubt about it. They are, "shall not apply in any case in which proceedings

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have been taken before the passing thereof"; and sub-s. 3 says: "The provisions of this Act shall be applied in all cases heard and determined in any Court having jurisdiction to deal with the case." Therefore I am of opinion that the Legislature has clearly said—whether that was what was meant or not does not matter—that the limit of jurisdiction is the taking of proceedings, and not the actual date of the accident. That being so, I feel perfectly justified in coming to the conclusion I have done, although under the old practice, if the blowing of the whistle under the regulations for preventing collisions at sea was not performed, the Court of Appeal would have held that that was in itself sufficient to make the vessel to blame under s. 419 of the Merchant Shipping Act. Under the Maritime Conventions Act the Court is clearly authorized by s. 4, sub-s. 1, to see whether the breach of the regulation did or did not contribute to the collision. It means that the statutory provision that the mere fact of a breach of the regulations, whether it did or did not contribute to the collision, shall be held to be a breach and render the vessel responsible for the collision as one of two wrong-doers, is repealed, and the Court is left to exercise its own proper jurisdiction and discretion in the case before it.

I am of opinion that the *Gripfast*, in this case, is not in any way to blame. The whole fault of the collision was due to the wrongheadedness of the tugmaster, and the *Enterprise* is alone to blame for the collision.

Solicitors for plaintiffs, the owners of the *Gripfast*: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

Solicitors for defendants, the owners of the *Enterprise*: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

T. L. M.

THE CALIPH.

1912
July 31.

Admiralty—Ship—Collision — Loss of Life — Limitation of Time—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 3—*Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 8.

A claim against a vessel, or her owners, for damages for loss of life may, under s. 8 of the Maritime Conventions Act, 1911, be brought within two years from the date when the loss was caused, notwithstanding the provisions of the Fatal Accidents Act, 1846, by which an action to recover damages for loss of life must be commenced within twelve calendar months after the death of the deceased person.

Action of Damage by Collision.

The plaintiff was Hannah Williams, administratrix of the estate of Joseph Williams, deceased, late owner and master of the ketch *Glyndwr*.

The defendants were the owners of the steam trawler *Caliph*.

On the afternoon of December 16, 1910,—the wind at the time being westerly strong, the weather squally, and the tide flood—the *Glyndwr*, a ketch belonging to the port of Chester, of twenty-six tons register, and manned by Joseph Williams and another hand, was lying at anchor in Dale Roads, Milford Haven, when she was fouled by the steam trawler *Caliph*, which drove down upon her, and broke her adrift, with the result that the *Glyndwr* drifted across the roads and was totally lost on the rocks near the Castle Head, both members of her crew being drowned.

The plaintiff claimed compensation for (1.) the loss of the ketch, and (2.) on behalf of herself as the widow, and Rachel Maud Williams, Benjamin Griffith Williams, David George Williams, and Mary Williams (children and dependents of the deceased Joseph Williams), for the loss of the said Joseph Williams by drowning by reason of the collision between the *Glyndwr* and the *Caliph*, which the plaintiff alleged was solely caused by the negligence of the defendants or their servants.

By their defence the defendants, as to (1.), admitted liability for the value of the ketch *Glyndwr*, and claimed a reference to the registrar and merchants to assess the amount of damage. As to (2.) (the claim by the plaintiff, on behalf of herself and others, children and dependents of Joseph Williams), the

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defendants said that: "By the provisions of 9 & 10 Vict. cap. 93, sect. 3 (The Fatal Accidents Act, 1846), every action to recover damages for loss of life must be commenced within twelve calendar months after the death of the deceased person. The plaintiff has failed so to do."

The writ in the action was issued on May 6, 1912, and the question before the Court was whether, under s. 8 (set out in the judgment) of the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), the claim was in time.

1912. July 31. *Laing, K.C.*, and *W. N. Raeburn*, for the plaintiff, the widow and administratrix of the estate of the late master of the *Glyndwr*. In *The Vera Cruz* (1) it was held that the Admiralty Court Act, 1861 (24 Vict. c. 10), did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93), and, therefore, an action in rem for such damages could not be entertained; but in *The Bernina* (2) it was held that an action in personam could be brought, and now, by s. 5 of the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), jurisdiction, in cases of loss of life, is given both in rem and in personam. By s. 8 of that statute the limitation of time within which a claim may be made is two years from the date when the loss was caused, thereby, in effect, extending the time limit of one year, fixed by Lord Campbell's Act (s. 3), from the death of the deceased person, and, in fact, creating a new remedy in respect of loss of life. The claim of the plaintiff is, therefore, properly brought and in time. [Reference was made to the cases of *Markey* v. *Tolworth Joint Isolation Hospital District Board* (3), *The Burns* (4), and *The Rigel.* (5)]

Bateson, K.C., and *Lewis Noad*, for the defendants, the owners of the *Caliph*. The collision in this case occurred on December 16, 1910, and, under Lord Campbell's Act, the time within which a claim could be brought for compensation for the loss of the life of Joseph Williams was twelve calendar months after the death. This period expired on December 15, 1911, and the claim was,

(1) (1884) 10 App. Cas. 59.
(2) (1887) 12 P. D. 58; (1888) 13 App. Cas. 1.
(3) [1900] 2 Q. B. 454.
(4) [1907] P. 137.
(5) [1912] P. 99.

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therefore, non-existent on the following day, when the Maritime Conventions Act was passed. Secondly, assuming that the Maritime Conventions Act does apply, that Act does not extend the time within which the claim can be brought, for, whenever that Act repeals sections of previous Acts, it does so in express terms, as in the case (s. 4) of the abolition of the statutory presumptions of fault arising under the Merchant Shipping Act, 1894; but the Act intentionally omits the case of "damages for loss of life" when dealing, in s. 8, with the period of two years within which proceedings may be commenced in respect of "damage or loss or injury." The suggested extension of time must, therefore, be by implication; but the law does not allow the revocation or alteration of a statute, in this case a special Act, by construction, unless the provisions of the later, and in this case general, Act are so inconsistent with or repugnant to those of the earlier Act that the two cannot stand together, which is not the case here: see Maxwell on the Interpretation of Statutes, 5th ed. (1912), pp. 253 et seq.

Bargrave Deane J. This is an action in which a ketch at anchor was driven down upon by another vessel and broken adrift. It was blowing hard at the time, and the ketch drove ashore and both hands on board were drowned. It is admitted that the accident occurred through the negligence of those on board the *Caliph*.

There would have been no right of action by the widow for the loss of the life of her husband but for Lord Campbell's Act of 1846 (9 & 10 Vict. c. 93, s. 3). By that Act she is entitled to bring an action for damages for the loss of the life of her husband, but she must bring it within twelve months after the death. So the law stood, and, but for the Maritime Conventions Act, would still stand; but s. 8 of that Act, according to the contention of the plaintiff, extended the time to two years. The section says: "No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel,

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whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered . . . ." Therefore, in respect of the matters mentioned in the earlier part of the section, any action must be commenced within two years. The words are " damage, or loss, or injury "—three things. The first is damage or loss to another vessel, the second damages for loss of life or personal injury, and then there comes salvage. Therefore you have exactly the same language used, except the words loss " of life," which are not mentioned in the later part, but it is all part of the same section, and it says that the action shall not be maintainable unless brought within two years. The section goes on to say that " an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment "—which would be a considerable time after the original loss.

Now, as I read this section, it extends the time in which alone an action could be brought by a widow for damages for the loss of the life of her husband from one year to two years; but counsel for the defendants argue that, this man having been drowned on December 16, 1910, the widow ceased, under Lord Campbell's Act, to have any right of action after December 15, 1911, and the Maritime Conventions Act only receiving the Royal assent on December 16, 1911,—the next day—she cannot be heard to revive an action which is already dead. In the last case (*The Enterprise* (1)) I pointed out that the Legislature had in view in passing the Maritime Conventions Act that they were dealing, in regard to the application of the Act, not with the date of the cause of action, but with the date at which proceedings were commenced, and the statute says the action shall be brought within two years from the date of the right of action, whereas Lord Campbell's Act says one year.

I have no doubt, although it may be badly worded, as, unfortunately, many Acts of Parliament in recent years have

(1) Ante, p. 207.

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been, that the meaning of the Legislature in this section is that an action for damages for loss of life shall not be maintainable unless brought within two years after the date when the damage or loss was caused. I am, therefore, of opinion that, under the Maritime Conventions Act, the time under Lord Campbell's Act —limiting the right of action to one year after the date of death —is extended to two years. I think that is the short point which I have to decide, and I hold that the plaintiff is entitled to recover under s. 8 of the Maritime Conventions Act, 1911, extending the time under s. 3 of Lord Campbell's Act.

Solicitors for plaintiff: *W. & W. Stocken, for Williams & Williams, Fishguard.*

Solicitors for defendants: *William A. Crump & Son.*

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July 8, 9, 11.

Admiralty—Ship—Collision—Damage—Consequential Damage—Negligence of Plaintiff—Rule of Common Law or Admiralty—Costs—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61).

In an action brought against the Town Council of the borough of Sandwich to recover the amount of the original and consequential damage sustained by the plaintiff's steam launch as the result of a collision between the launch and the defendants' dredger, it appeared that both the plaintiff and the defendants had been guilty of negligence in respect of the original collision, but that blame could not be thrown upon any one in particular in respect of the consequential damage:—

Held by Bargrave Deane J., that the principles of the common law as to contributory negligence, and not the admiralty rule as to both to blame, applied, so that, instead of the loss, arising out of the collision and the consequential damage, being divided between the plaintiff and the defendants, the plaintiff's action was barred by his contributory negligence in respect of the original collision, and, therefore, judgment must be entered in favour of the defendants with "public authority" costs.

Action of Damage by Collision.

The plaintiff was George Percy Argrave, owner of the steam launch *Fawn.*

The defendants were the Town Council of the borough of Sandwich, owners of the dredger *Blow Boat.*

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The case is reported on the question of the nature of the action brought by the plaintiff as affecting the extent of his liability for contributory negligence.

On July 20, 1911, about 10.30 A.M., the weather being fine and clear, with little or no wind, and the tide half ebb of a force of from one and a half to two knots, the steam launch *Fawn* was proceeding down the river Stour at a speed of some three to four knots, and, when approaching the swing bridge between Sandwich and the Isle of Thanet, those on board observed ahead, and moored some dozen yards below the bridge, the defendants' *Blow Boat*, a craft used for dredging, and which was heading down the river, working with only her starboard wing out. According to the plaintiff's preliminary act, the engines of the *Fawn* were stopped; but, on those on board the *Blow Boat* hailing her to come on, they were, according to the evidence, re-started too late to get her under control, so that, under the action of the tide, she drifted, at an angle, and when she was about to pass the *Blow Boat*, the starboard bow of the *Fawn* came into collision with, and was damaged by, the submerged port wing of the dredger. As the *Fawn* was found to be making water, she was pulled clear of the *Blow Boat*, hauled to the other side of the river, laid on the mud, and then, with the aid of the defendants' crane, would have been hoisted on to the quay; but, in the process of lifting her, the stern rope carried away, with the result that the steam launch fell, and broke her back.

In respect of the collision, the plaintiff in his statement of claim alleged that those on board the *Blow Boat* were negligent in hailing the steam launch to come on, and in omitting to give any warning to those on the *Fawn* of the submerged wing of the dredger.

In respect of the subsequent damage, the plaintiff charged the defendants with, by their servants or agents, using a rope of insufficient strength, and with so negligently working the crane that the chain slipped and caused the rope to break.

The defendants denied that they, or their servants, had been guilty of any negligence, and alleged that there was room for the *Fawn* to pass the dredger in safety if she had been under proper control. With respect to the subsequent damage, the defendants,

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by paragraph 5 of their defence, alleged that after the collision "the defendants, at the request of the plaintiff, voluntarily allowed their crane to be used for the purpose of lifting the *Fawn* on to the quay. The plaintiff himself obtained the ropes that were used as slings and were placed round the two ends of the *Fawn*. During the operation of lifting her the stern sling broke and the stern of the *Fawn* fell on to the river bed. The said accident was due to the breaking of the said rope, which did not belong to, and was not supplied by, the defendants; but was obtained by the plaintiff from one Foord, who remained in the *Fawn* while she was being lifted, and who, being a man of great weight, put a heavy strain upon the sling which parted."

The defendants further alleged that they took no part in the lifting of the *Fawn*, "save that they voluntarily loaned and worked their crane," and, if the rope used was not of sufficient strength, "the plaintiff was guilty of negligence in allowing it to be used, and in permitting the said Foord to remain in the *Fawn* while she was being lifted."

The case was heard by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, on July 8 and 9, 1912, and adjourned to July 11 for further argument as to the liability for negligent management of the crane leading to additional damage to the launch.

It was contended on behalf of the plaintiff that the defendants were liable for the negligent, though voluntary and gratuitous, management of the crane: *Coggs* v. *Bernard* (1); that, in the circumstances, the onus was on the defendants to negative negligence on their part: *Phipps* v. *New Claridge's Hotel, Ld.* (2), citing *Dollar* v. *Greenfield* (3); *Scott* v. *London Dock Co.* (4); that the subsequent damage was the natural and reasonable consequence of the defendants' prior negligence, although human acts intervened: *The City of Lincoln* (5); and that the damages claimed were not too remote: *The Argentino.* (6)

(1) (1703) 2 Ld. Raym. 909; 1 Sm. L. C., 11th ed. 173.
(2) (1905) 22 Times L. R. 49.
(3) *The Times*, May 19, 1905.
(4) (1865) 3 H. & C. 596.
(5) (1889) 15 P. D. 15.
(6) (1889) 14 App. Cas. 519, judgment of Lord Herschell, pp. 522, 523.

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It was urged on behalf of the defendants that the *Blow Boat* was not a vessel used in navigation within the definition of a ship in s. 742 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) : *The Gas Float Whitton No.* 2 (1) ; *The Upcerne.* (2) The case must, therefore, be determined on common law and not on admiralty principles, and, as the plaintiff could by ordinary care have avoided the consequences of the defendants' negligence (if any), he was not entitled to recover anything : *The Monte Rosa* (3), following *The Margaret* (4) ; and the defendants, as a public authority, were entitled to their costs as between solicitor and client : The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

D. C. Leck, for the plaintiff, the owner of the steam launch *Fawn.*

D. Stephens, for the defendants, the owners of the dredger *Blow Boat.*

BARGRAVE DEANE J. I think this is a common law action. It is brought against the Town Council of the borough of Sandwich, who owned a nondescript sort of craft which was employed in the dredging of the river, and my view is that the servants of the defendants were guilty of some negligence in not warning those in charge of the steam launch—in inviting them to come on instead of warning them—and it seems to me to be a common law question entirely.

The plaintiff himself was guilty of negligence, because when he was invited to come on in the river, with this dredger in the way, instead of starting with his launch under command by having her engines moving, he was taken down by the tide on to the after or fore part—I am not sure which is the after and which the fore part—of this square thing, whereby his launch was damaged. I cannot see that I can excuse the plaintiff for the negligent handling of his craft.

(1) [1897] A. C. 337.
(2) [1912] P. 160.
(3) [1893] P. 23, at p. 30.
(4) *Cayzer* v. *Carron Co.* (1884) 9 App. Cas. 873. As to the difference between the rule in admiralty and at common law where the cause of the accident is the fault of both parties, see judgment of Lord Blackburn at p. 881.

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Then comes the second point. The launch having been so damaged that it was not safe to leave her for the tide to come up and so injure her engines, it was thought advisable by everybody concerned that she should be lifted up on to the quay, out of the way of the tide. Accordingly everybody in Sandwich seems to have collected round the place, and one person brought some ropes to lift her by, other people manned a crane, and one individual, weighing seventeen stone, sat in the stern of this launch by way of assisting her to go up, with the result that—whether there was a kink in the chain which made it jerk I do not know—the after sling broke and let not only the launch but the individual weighing seventeen stone down into the mud. The launch was thereby damaged, and how can I say it was the fault of A., B., or C.? If it was the fault of anybody, I suppose it was the fault of the individual who, with his seventeen-stone weight, remained sitting in the stern of the launch when she ought to have been made as light as possible. I cannot see that anybody was to blame for what happened. Everybody with the greatest good nature lent a hand, and the accident happened without my being able to impute blame to anybody.

If it was not a common law action, it would be one in which, both parties being to blame for the original accident, the after trouble would be the natural consequence of the original collision, and the parties would have to share the loss.

I am of opinion, however, that this is a common law action, and then the principle is different from the principle which applies in an admiralty action. When a plaintiff brings a common law action for negligence, and he himself is guilty of negligence, the rule of law is that the defendants have judgment, because the plaintiff ought not to have brought the action. That is the case here, and I must give judgment for the defendants, with "public authority" costs as between solicitor and client.

Solicitors for plaintiff, the owner of the *Fawn: Kingsford, Dorman & Co., for Walter Hills & Shea, Canterbury.*

Solicitors for defendants, the owners of the *Blow Boat: J. A. & H. E. Farnfield.*

T. L. M.

C. A.
1912
July 10.

[IN THE COURT OF APPEAL.]

LORAINE *v.* LORAINE AND MURPHY.

Divorce—Petition for Settlement under the Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Wife's Interest under Will without Power of Anticipation—Second Marriage after Presentation of Petition—Jurisdiction —Lis Pendens—Forfeiture on Alienation of Interest—Effect of Order for Settlement—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

Upon a petition for a settlement under s. 45 of the Divorce Act, 1857, the Court has no jurisdiction, in a case where the wife has married again, to order a settlement by her of property to which she is entitled under the trusts of her father's will for her separate use without power of anticipation.

To order such a settlement would be in effect to vary the trusts of the will, which the Court has no power to do, either under s. 45 of the Matrimonial Causes Act, 1857, or under s. 5 of the Matrimonial Causes Act, 1859.

In such a case the presentation of a petition under s. 45 will not operate as a lis pendens so as to prevent the restraint upon anticipation from re-attaching upon the wife's subsequent marriage.

Semble, that an order for a settlement under s. 45 of an interest derived under an instrument containing a provision for forfeiture on alienation of, or on the commission by the donee of any act divesting, such interest, would not work a forfeiture of the same.

Constantinidi v. *Constantinidi and Lance*, [1904] P. 306, distinguished.

Decision of the President (ante, p. 86) reversed.

Appeal from a decision of the President. (1)

The husband, the petitioner in the above-mentioned suit, obtained on May 10, 1911, a decree absolute dissolving his marriage with the respondent. The only issue of the marriage was a son born on May 4, 1899.

On May 29, 1911, the petitioner presented a petition for a settlement under s. 45 of the Matrimonial Causes Act, 1857. This petition was served on the respondent on June 3, 1911.

On June 4, 1911, the respondent married the co-respondent.

The property referred to in the petition for a settlement, and to which the respondent was entitled, was as follows:—

Under the trusts of the settlement made upon the marriage of her parents in 1873, the respondent had, in default of

(1) Ante, p. 86.

appointment by her father, who died in 1896, become absolutely entitled to a sum of 3000*l.*, subject, however, to her mother's existing life interest therein.

Under the will of her father, the respondent was entitled for her separate use without power of anticipation to the income of a fund settled by his will, subject nevertheless to her mother's prior life interest therein. The capital value of this fund was to be such a sum as with the 3000*l.* marriage settlement moneys above mentioned would amount to 30,000*l.* After the respondent's death the fund so settled was to be held upon trust for the respondent's child or children as she should by deed or will appoint, and in default of appointment for them as therein mentioned.

The will contained the following forfeiture clause:—"And I do hereby declare that if any of my children shall alienate charge sell or part with or attempt to alienate charge sell or part with his her or their prospective interests under this my will whether absolute contingent in reversion expectancy or otherwise or shall do or commit any act whereby if absolutely vested in him her or them his her or their shares would vest in some other person or persons or company then and in any such case such child or children shall forfeit all his her or their interest under this my will as absolutely as if he she or they had predeceased me leaving no issue or been expressly excluded from all participation in my said estate under this my will."

By deeds of appointment made in 1903 and 1908 the sums of 5000*l.* and 10,000*l.* respectively were appointed by the respondent, subject to her own life interest therein, in trust for the child of the marriage absolutely.

In his report the registrar recommended that the Court should order that upon the death of the respondent's mother the trustees of the will of the respondent's father should pay two-fifths of the income from the fund of 30,000*l.* derived by the respondent under the said will and the said indenture of settlement to the petitioner during the joint lives of the petitioner and respondent, and, in the event of the death of the petitioner during the life of the respondent, should order that the said trustees should pay one-third of the said income, during the

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minority of the said child, to such guardian as therein mentioned until the said child should complete his education at school or the university, or should pass into the Navy, and thereupon that the said trustees should during the respondent's lifetime pay one-fourth of the said income to the said child.

On motion, the President confirmed the registrar's report (subject to certain amendments in detail but not affecting the principle) and overruled the objections taken on behalf of the respondent, being of opinion that the Court had power to order the respondent to make a settlement of the property derived under the will notwithstanding the restraint upon anticipation and the forfeiture clause, and that such an order not being a voluntary alienation would not work a forfeiture. (1)

The respondent appealed.

Priestley, K.C., and *Talbot-Ponsonby*, for the appellant. The only application in this case was for a settlement under s. 45 of the Matrimonial Causes Act, 1857 (2), and the Court below has made an order which it had no power to make. The Court has ordered the appellant to make a settlement, or has purported to deprive her, of property after she has married again, and after the restraint against anticipation has attached to that property. The Court is too late and cannot now make such an order. That appears clearly from Kay L.J.'s judgment in *Midwinter* v. *Midwinter*. (3) The order is in effect a variation of the trusts of the father's will, and there is no power given to the Court by any statute to vary a will.

In his judgment the President referred to *Milne* v. *Milne and Fowler* (4) and *Constantinidi* v. *Constantinidi and Lance* (5), but those decisions have no application whatever to this case; in the

(1) Ante, p. 86.

(2) The Matrimonial Causes Act, 1857, s. 45: "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

(3) [1892] P. 28, 38, 39.

(4) (1871) L. R. 2 P. & M. 295.

(5) [1904] P. 306.

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former the woman was not a feme covert as she is here, and in the latter the application was for the variation of a settlement under s. 5 of the Matrimonial Causes Act, 1859 (1), which does not touch a case like this where there is property which is not under any settlement at all.

If the doctrine of lis pendens is applicable, the petition for a settlement constituted a lis pendens only on such property as the wife had power to deal with, and her second marriage altered her property or the nature of it. In *Hyde* v. *Hyde* (2) it was held that sequestration could not be enforced against future income which the wife was restrained from anticipating, and which cannot be attached: *Pike* v. *Fitzgibbon* (3); *Tullett* v. *Armstrong* (4); *In re Wheeler's Settlement.* (5)

The doctrine of lis pendens does not apply to personal property other than chattel interests in land: *Wigram* v. *Buckley.* (6)

Further, the appellant objects to any order which may work a forfeiture of her interest under her father's will. The Court will not make an order which would occasion such a forfeiture: per Lindley L.J. in *Corbett* v. *Corbett.* (7) Such an order as that now appealed against would work a forfeiture under the words "or shall do or commit any act" in the clause in the will: *Ex parte Eyston* (8); *Roffey* v. *Bent.* (9)

Cave, K.C., and *MacConkey*, for the trustees. The persons entitled in the event of forfeiture are not before the Court.

The Matrimonial Causes Act, 1859, s. 5, was passed to counteract the decision in *Norris* v. *Norris and Gyles* (10) on s. 45 of the earlier Act of 1857, to the effect that marriage settlements could not be interfered with under that section. An order under s. 45

(1) The Matrimonial Causes Act, 1859, s. 5: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

(2) (1888) 13 P. D. 166, 173.
(3) (1881) 17 Ch. D. 454.
(4) (1838) 1 Beav. 1.
(5) [1899] 2 Ch. 717.
(6) [1894] 3 Ch. 483.
(7) (1888) 14 P. D. 7, 12.
(8) (1877) 7 Ch. D. 145.
(9) (1867) L. R. 3 Eq. 759.
(10) (1858) 1 Sw. & Tr. 174.

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does not bind property subject to a restraint against anticipation; if it did, no doubt the petition would be a lis pendens and would prevent the restraint against anticipation from re-attaching: *Bellamy* v. *Sabine* (1), where the effect and nature of a lis pendens were discussed. The restraint against anticipation of her interest arises by operation of law and not by her act, and the property cannot be attached.

Barnard, K.C., and *Le Bas*, for the petitioner. The President's order was right and should be affirmed.

The first question is one of construction upon the forfeiture clause in the will. That clause only refers to voluntary alienation, and this order for a settlement under s. 45 is not a voluntary act, but it is entirely the act of the Court. The wife has not done anything actively or been party to any act of forfeiture. The clause comes within the terms of the judgment in *Lear* v. *Leggett*. (2) In *Dommett* v. *Bedford* (3) it was regarded as a very doubtful point whether an involuntary alienation by bankruptcy would work a forfeiture, but in that case there was the further element of an assignment executed by the bankrupt. Moreover, the wife is only ordered to settle a part of the income, and that does not come within the clause in the will which relates to the whole of her interest.

The remaining question is with regard to the restraint against anticipation. That restraint does not affect this application for a settlement because when the petition was filed on May 29, 1911, the respondent was a feme sole, the decree absolute having been made on May 10, 1911. There is no difference in principle between the filing of a petition for variation of a settlement under s. 5 of the later Act and the filing of a petition to order a settlement under s. 45 of the earlier Act. Under *Constantinidi* v. *Constantinidi and Lance* (4) the Court will vary the settlement notwithstanding the restraint on anticipation, and, this petition being a lis pendens, the Court will not let the subsequent marriage interfere. *Midwinter* v. *Midwinter* (5) has no application to this case.

(1) (1857) 1 De G. & J. 566.
(2) (1830) 1 Russ. & My. 690.
(3) (1796) 3 Ves. 148.
(4) [1904] P. 306.
(5) [1892] P. 28.

COZENS-HARDY M.R. This is an appeal from the decision of the President (1), raising at first blush a point of considerable difficulty and interest. The lady, the wife, was entitled under her father's will to a life interest in a sum of 30,000*l.*—I say 30,000*l.*, but it was subject to a deduction of 3000*l.* in certain events. A restraint on anticipation was imposed by the father's will. There is also a forfeiture clause which I shall have something to say about subsequently.

The point on which I decide this case is the restraint on anticipation. The proceedings taken by the husband in the Divorce Court were followed by the usual decree nisi, the order making the decree absolute, and a petition for settlement, presented by the husband. There is one child of the marriage, and the husband presented a petition, stating on the face of the petition that the wife had this life interest subject to restraint on anticipation and asking for the usual inquiry and for settlement. The registrar reported in these circumstances, and the learned judge, the President, has confirmed the registrar's report, apparently on the ground that, having power to deal with property settled by marriage settlements notwithstanding a restraint on anticipation, it would be a curious state of law if he could not deal with property coming to one of the parties under a will containing such a restraint. With great respect to the learned President, I think he has entirely overlooked for the moment what is the section under which the power to vary settlements is given to the Court, and what is the section under which, and under which alone, this present application is made.

Sect. 45 of the Act of 1857, which is the section with which we are concerned, says that "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either

(1) Ante, p. 86.

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or any of them." Compare that with the language of the Act of 1859, s. 5, which says that "the Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements"—not any instrument under which the wife takes any beneficial interest, but "into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." This power conferred by s. 5 of the Act of 1859 is a power enabling the Court in terms to vary and alter settlements, and settlements only, made either before or after the marriage of the husband and wife whose marriage is in question. It certainly does not go beyond those settlements which are either ante-nuptial or post-nuptial, and I think for a very good reason. The settlement of the parties to a divorce suit is an arrangement which it seems perfectly reasonable and right that the Court should have power, in the event of the misconduct of the wife, to modify, and to modify in such a way as the statute provides, but there is no such power whatever given by s. 45. The interest which the wife takes under any other instrument is something which the Court cannot interfere with. The Court can only look and see what is the interest which the wife takes, and such interest as she takes under that instrument is one which the Court cannot interfere with, and cannot enlarge, curtail, or destroy.

In the present case what is proposed to be done and what the learned President has decided to do is to disregard this restraint on anticipation, being of opinion that he had power to disregard it and thinking it was right that a certain proportion of the income should be paid to the husband and other provision made for the child. If the learned President had jurisdiction to do it, I have not the smallest doubt that he wisely exercised his discretion. But I fail to find any power which he possessed for that purpose.

It was said in argument that *Constantinidi* v. *Constantinidi and Lance* (1) has decided that, the petition being presented while the

(1) [1904] P. 306.

lady was unmarried, the rights of the parties cannot be in any way prejudiced or affected by the subsequent marriage taking place before the petition came on and before the order had been made. Now, *Constantinidi* v. *Constantinidi and Lance* (1) arose under s. 5 of the Act of 1859. The effect of the second marriage if it had taken place there would have been that the second husband would under the terms of the marriage settlement have taken a life interest, in fact there would have been a new person coming into existence pending the suit for an order under s. 5. In those circumstances we held in this Court, and I feel no doubt that our decision on that point was right, that in a case like that the pendency of the suit and the presentation of the petition would prevent any person, pending that proceeding and with notice of it, from asserting any right which the Court might not otherwise have been able to deal with. That has no application whatever to a case under s. 45 of the Act of 1857.

We are really asked—there is no disguising the matter—by the petitioner in this case to alter and interfere with that which is not the creation of the married woman herself, but is a part of the will of her father, under which will, unaltered and untouched, she must take, and alone can take, the interest now in question. I have endeavoured to put my view on this point in my own words, but although it may not be a decision on the point,—and I do not think it is a decision,—the observations of Kay L.J. in *Midwinter* v. *Midwinter* (2) seem to me so apt and so entirely appropriate to this case that I think it better just to read a few sentences from his judgment. He says: "The circumstances here are very peculiar. It seems that information has already been obtained that the wife has—not by a marriage settlement, which by section 5 of the Act of 22 & 23 Victoria, c. 61, could be altered, but under the will of her father which cannot, by any of the statutes, as I understand them, be altered at all—a life interest for her separate use in property devised by that will, as to which she is restrained from anticipation". Those words anticipate and describe with extraordinary accuracy the events which we actually have here. The learned Lord Justice goes on: "and, therefore,

(1) [1904] P. 306. (2) [1892] P. 28, 38.

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while the coverture exists, that is until after the decree absolute has been pronounced, she has no power to settle that property, and the Court, as I read the statute, has no power to either make a settlement, or compel her to do so, of that property. The order for settlement must be made after the decree absolute has been pronounced." On general principles, on my own construction of the section of the Act of Parliament,—assisted as I am by the judgment of Kay L.J. and not consciously departing from any decision which has been called to our notice,—I think that the order made by the President in this case cannot be supported and that this appeal must be allowed.

I said that I would just mention the second point. It is not really a question of any general interest at all, but I do not think, according to the fair construction of the forfeiture clause, that the effect of the order of the President, assuming it to stand, would have created a forfeiture.

FARWELL L.J. I am of the same opinion. I will not add anything with regard to the forfeiture clause.

As to the other point, it is necessary to keep in mind the two different jurisdictions created by the two separate Acts of Parliament. Under the earlier Act of 1857 the Court has power, if it appears that the wife is entitled to any property either in possession or reversion, to order " such settlement as it shall think reasonable to be made of such property or any part thereof for the benefit of the innocent party and the children of the marriage, or either or any of them." It gives the Court no power whatever to vary any existing settlement, marriage settlement or otherwise, still less to vary any will or other instrument under which the wife may take. That was decided very early after the Act. Then the Act of 1859 was passed, s. 5 of which gives the Court power to vary ante-nuptial or post-nuptial settlements, but nothing else. It follows, therefore, that when the wife takes under a will the only order that can be made against her is under s. 45 in respect of her own property, whatever it may be. There is no power to vary at all. If, therefore, the wife's interest is one which is a life interest which she is restrained from anticipating, the Court has no

power to make an order which will get rid of that restraint on anticipation.

So far as regards the second Act, I think it is clear on the cases that have been cited that, if a petition had been presented before any dealing with the property subject to this ante-nuptial or post-nuptial settlement, the doctrine of lis pendens would apply, because, the Court having statutory power to alter the provisions of those settlements and having by due procedure been given seisin of a petition to exercise that jurisdiction, no one who comes in after can complain if that jurisdiction is exercised so as to affect his rights. The jurisdiction was called into existence before the alteration. That agrees with *Constantinidi* v. *Constantinidi and Lance* (1), and I think it is reasonably plain.

Different considerations apply when you come to s. 45 of the earlier Act. There, the only right is to make an order in respect of the wife's property. There is no power whatever authorizing the Court to alter the nature of it, nor can I see that a petition under that section can have any effect whatever as a lis pendens. Mr. Cave called our attention to a judgment of the Lord Chancellor in *Bellamy* v. *Sabine* (2), where the Lord Chancellor says "It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." There is no power in the Court to get rid of the restraint on anticipation, and, therefore, so far as the doctrine of lis pendens is concerned it is useless for any purpose which will serve to support the judgment in the present case.

With the greatest respect to the learned President, I think he has really failed to give consideration to the difference between the two sections of the respective Acts of Parliament, because he reasons from the Act of 1859 back to the Act of 1857. In my opinion that is false reasoning, and I agree that the appeal should be allowed.

KENNEDY L.J. I am of the same opinion. It is clear, as I read the judgment of the learned President, that, with great respect, he has done that which in my humble opinion, when you

(1) [1904] P. 306. (2) 1 De G. & J. 566, 578.

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compare the two sections under consideration, the Court cannot do. The section of the Act of 1859 says that you may vary marriage settlements, whether ante-nuptial or post-nuptial, where there has been a decree of nullity or dissolution of marriage. Therefore, if you may vary, you may deal with the clauses contained in these settlements as is thought just, and in regard to such cases I concede, without saying more, that we should be bound to apply the doctrine of lis pendens in accordance with the decision in this Court in *Constantinidi* v. *Constantinidi and Lance.*(1) If there is power to vary, the Court, where there is a lis pendens, has a right to prevent any alteration by the wife, if it is her settlement which is to be affected, so dealing by entering into subsequent arrangements, whether by settlement or another marriage, which will dispose of that which the Court has by the terms of the section a right to deal with by varying the arrangements and stipulations contained in the marriage settlement.

The learned President said that it would be a curious state of the law if he could not apply the power of variation given by the Act of 1859 to a case under the Matrimonial Causes Act of 1857. His order is a variation in effect, because while he says that the application is not to vary a will, but to order a settlement of property devolving under it, it is varying the will in fact, because if the order settles property which devolves upon her under it, it is property which devolves upon her only upon terms of the will which, if not altered, prevent the order which has been made from taking effect, because there is the restraint on anticipation. There is no power under the Act of 1857 to vary any existing settlement, will, or other instrument under which the wife takes.

It seems to me that the learned President, with great respect, has assumed in the present case that something devolves upon the wife which without a variation of the terms of the will does not in fact so devolve; and that the order which was made is wrong.

With regard to the forfeiture clause I desire to add nothing.

COZENS-HARDY M.R. In discharging this order we have no doubt that the Court can make any order it thinks fit as to the

(1) [1904] P. 306.

3000*l.*, and it must not be said that we are in any way prejudicing the order with regard to the 3000*l.* The discharge of this order is without prejudice to any question as to the settlement of the 3000*l.*

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Appeal allowed.

Solicitors for appellant: *May, Sykes & Co.*

Solicitors for trustees: *Evans, Lockett & Co., Liverpool.*

Solicitors for petitioner: *Van Sandau & Co., for Wright, Becket, Wright & Co., Liverpool.*

R. M.

[IN THE COURT OF APPEAL.]

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In re BONNEFOI.

SURREY *v.* PERRIN.

Conflict of Laws—Foreign Subject—Administration—Succession to Property—Movables—English Document—Construction—Jurisdiction.

An Englishwoman married an Italian and was left a widow and a domiciled Italian subject. She made no will, but signed a letter said to constitute a holograph will in Italian law, and died leaving personal property in England and in Italy. Her sisters issued a writ in the Probate Division as next of kin for a grant of letters of administration of her estate. Other persons, claiming under the holograph, then commenced proceedings in Italy and applied in the probate action for a stay of all the proceedings in that action. There was no dispute as to the Italian law. Upon appeal from an order staying the proceedings, the only question of substance in dispute was on the construction of the holograph letter:—

Held (reversing the order of Sir S. F. Evans, President), that the English Court had jurisdiction to make an administration order and therefore to decide any question with regard to the assets of the deceased; and that the question, being only of construction of English words, ought to be decided in the English Courts.

APPEAL from an order made by the President.

In 1888 Miss Emily Rose Perrin, a British subject, married Captain Bonnefoi, an Italian, and became a domiciled Italian subject. She resided with her husband in Venice till his death in 1891. From that time she continued to reside in Venice and retained her Italian domicil until her death on September 4, 1911, intestate. Although she did not make a will in proper

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form, a letter signed by her was produced which was said to constitute a holograph will according to Italian law. This letter was addressed to a Mr. Eaden, an English solicitor, and was as follows :—

"Albergo, Alla Posta,
"Caprile, Bellamo, Italy,
" August 1st, 1900.

" Dear Mr. Eaden,

"Your note of the 21st ulto. has only just reached me. Many thanks for it. I fully appreciate your suggestion but the fact is that what has seemed culpable negligence on my part has really been deliberate intention. I have not been able to solve the question entirely to my own satisfaction, and I have let the making of my will slide up to the present in the belief that if I die intestate the bulk of my money would go exactly where I intend it to go viz.: to my only brother Captain Perrin 3rd Northamptonshire Regt. provision being under these circumstances already made for my trust money. It now remains to be seen how my brother comes out of this general scrimmage. I may state that I have informed him of my intentions and also of the fact that up to the present I have made no will. After the middle of September I expect to be back in Venice and I hope by that time to have come to some definite conclusion on the point which has been troubling me—in the meantime perhaps you would prepare me a draft copy, I think you call it, according to instructions on the other sheet, to be sent to Venice after Sept. 15. It is just possible that I may be in England in the late autumn, but if not, I suppose there would be no difficulty in getting the will legally executed in Venice.

" With kind regards,
" Yours very truly,
" Emily Bonnefoi.

" My instructions are so short and simple that I think you will agree with me no draft copy is needed and the real document might be at once sent to Venice, I mean in September.

"Instructions for my Will.

" To my maid Mary Wright if still in my service at the time of my death 100*l.* and one year's wages. To each of my servants

who have been one year in my service one year's wages. To my brother Joseph Perrin Captain 3rd Northamptonshire Regt. the whole of my property absolutely and failing him to his only son Herbert Evelyn commonly called 'Jack.'"

Mrs. Bonnefoi's nieces, daughters of her brother Captain Perrin, claimed the bulk of her property under this so-called holograph will and the Italian law, by which a bequest to a brother does not lapse by his death, but enures for the benefit of his children. The deceased left about 16,000*l.*, of which about two-thirds were in England and one-third in Italy. All her next of kin were British subjects resident in England, except two who lived in Australia and one in Canada.

On January 22, 1912, two of Mrs. Bonnefoi's sisters issued a writ against the nieces in the Probate Division for a grant to one of them of letters of administration to the personal estate of the deceased. The nieces thereupon commenced proceedings in Italy, and a sequestrator of the Italian assets was appointed. On May 8 they gave notice to the plaintiffs in the English action of their intention to apply for an order (1.) extending the time for delivering their defence; (2.) that all further proceedings in the action should be stayed pending the decision of the Italian Courts as to whether according to the laws of Italy the letter constituted a holograph will of the deceased. On June 15 Sir S. F. Evans, President, sitting in chambers, made an order reversing the order of the registrar and directing that the action should be stayed till further order. The plaintiffs appealed.

Several affidavits were filed on both sides as to the nature of the proceedings in Italy, and it was not disputed that to constitute a holograph will the document must purport to dispose of property after death and the property disposed of must be the whole or a defined portion of the property of the deceased, and that the question in dispute was one of construction of the letter.

P. O. Lawrence, K.C., *T. Boston Bruce*, and *R. F. Bayford*, for the appellants. The proceedings in the English action ought to be allowed to go on. Italian procedure is complicated and will cause

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great delay. It is not suggested that the English Courts have not jurisdiction to decide the question—*Ewing* v. *Orr Ewing* (1)—and on the balance of convenience it will be far better to try it here. Most of the property is in England and all the parties interested except three reside here. None of them are in Italy. There is no real dispute as to Italian law; it is only a question of construction of a document written in English by an Englishwoman. It will be very difficult for the Italian Courts to arrive at a right construction of the letter, for they will be dealing with a translation of it, and the translations already made are admitted to be inaccurate. All the parties interested speak English and will understand an English judgment without the necessity of having it translated.

Lewis Thomas, K.C., and *Giveen*, for the nieces. The proper Court to decide this question is the Court of the domicil of the deceased: *Eames* v. *Hacon*. (2) No principle can be better established than that the administration of the personal estate of a deceased person belongs exclusively to the country in which he is domiciled at his death: *Enohin* v. *Wylie* (3); *Doglioni* v. *Crispin*. (4) The dispute must be determined according to Italian law—*In re Trufort* (5)—and for that purpose it will be necessary, if the English action continues, to bring to this country expert evidence of the Italian law on the subject. If the Italian Courts decide the question their decision will be accepted by the English Courts. The learned judge has exercised his discretion and his judgment should not be interfered with.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from an order of the learned President of the Probate Division under these circumstances. The lady was English by birth, but she married an Italian and was left a widow and her domicil became Italian. She made no formal will, but signed a document which is called a holograph will and is good according to Italian law. The bulk of her property is in England. All the next of kin except three live in

(1) (1883) 9 App. Cas. 34.
(2) (1880) 16 Ch. D. 407; affirmed on appeal (1881) 18 Ch. D. 347.
(3) (1862) 10 H. L. C. 1, 13.
(4) (1866) L. R. 1 H. L. 301, 314.
(5) (1887) 36 Ch. D. 600, 610.

England, and they are somewhere in the Colonies. This case has been argued as if there were some great question of law, but the law is quite simple, clear, and well settled. This Court has jurisdiction to deal with the property and to make an administration order. I will merely cite a passage from Dicey's Conflict of Laws, 2nd ed., r. 65, p. 318, where it is said that "Where the Court has jurisdiction to make a grant the Court has in general jurisdiction to determine any question with regard to the succession to the assets of a deceased person." If there was any doubt about that, the decisions of the House of Lords have removed that doubt entirely. Mr. Lewis Thomas has referred us to Lord Westbury's judgment in *Enohin* v. *Wylie*. (1) That judgment was dissented from by Lord Cranworth and Lord Chelmsford. I am going to read the passage from Lord Cranworth's judgment as cited in Stirling J.'s judgment in the case of *In re Trufort, Trafford* v. *Blanc*. (2) The passage is this: "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil." At the same page Stirling J. quotes a passage from the judgment of Lord Selborne in the case of *Ewing* v. *Orr Ewing* (3) which seems to put the matter so clearly that I shall read it, and that will be all I propose to say upon this point: "So far as relates to domicil, it has always appeared to me to be clear, that the domicil of a deceased testator or intestate cannot, in principle, furnish any governing or necessary rule except for the purpose of determining the succession to movable estate. For that purpose, recourse must be had, not always or necessarily to the Courts but, always and necessarily to the law of the domicil."

Now, the document which is said to be a holograph document, and which is, in form, a holograph document, is in the shape of a letter to the solicitor. The material passage is this: "I have not been able to solve the question entirely to my own satisfaction and I have let the making of my will slide up to the present in the belief that if I die intestate the bulk of my money would go exactly where I intend it to go viz.: to my

(1) 10 H. L. C. 1. (2) 36 Ch. D. 600, at p. 610.
(3) (1885) 10 App. Cas. 453, 502.

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only brother Captain Perrin, 3rd Northamptonshire Regiment, provision being under these circumstances already made for my trust money." It is not disputed that this is a document which is subject to Italian law and it has to be construed according to Italian law. It is a document in the English language, and there is no evidence before us and no dispute of any sort or kind as to what the Italian law is, the only dispute being as to the meaning of some words in the English language which are not words of technical legal description, as in the case we had before us this morning with regard to the meaning of the word "stint," but as to the meaning of the words "bulk of my money." It seems to me there is no difficulty whatever in saying that the English Court applying Italian law to this document (with all respect to the Italian Courts) is at least as competent as the Italian Courts to say what is the meaning of the English language used in this English document. The proceedings in this litigation were first commenced by the appellants, the English next of kin. Subsequently the people who claim under Italian law that this document is not merely good in form, but a good disposition of the bulk of her property to Captain Perrin, contended that, according to Italian law, the death of Captain Perrin would not create a lapse, but the property would all go to the daughters of Captain Perrin. The daughters of Captain Perrin commenced proceedings in Italy and applied in the English Court for a stay of the proceedings in the English action with a view to establishing their view in Italy. Why should this Court hesitate to exercise the jurisdiction which undoubtedly it has to deal with the property of this deceased lady and to decide, not according to English law, but according to Italian law, what is the meaning and effect of this holograph document which is before the Court? In my opinion, we should be wrong in saying that the English proceedings ought to be stayed, and I feel so confident of this that I do not like even to indicate a moment's doubt on the subject. I decline to believe that when an English Court has decided the construction and effect of a document of this kind, not according to English law but according to Italian law, the comity of nations will not prevail, and that when there is litigation arising out of the same document in Italy the Italian Courts will not follow

our decision. In my opinion the proper course is not to stay the action, but to let it go on in its natural course.

FARWELL L.J. I agree. There is no question of Italian law, which is the law applicable in the case between the parties. The only question in dispute is as to the meaning of certain words in the English language. So far as they are concerned, the Italian Courts will have to have an interpreter to tell them what they mean. If any judge decides on the interpretation which I find attributed to them by the respondents' experts he will go wrong. The statement is that the words "la massa del mio denaro" which stand for the English words "the bulk of my money" mean in Italian the "whole of my money." There is nothing in the English language which says that the words "the bulk of my money" mean "the whole of my money." The attempt to decide the question in Italy is only for the purpose of getting, not a miscarriage of Italian law, but a misconstruction of English words, for I cannot see any ground for the suggestion that the meaning in English of the words "the bulk of my money" is "the whole of my money."

As regards the other question, the Italians are among the most courteous of nations, and, according to the rule of comity of nations and from the affidavits which have been read to us, I have no doubt that the Italian Courts will, as Stirling J. did in *In re Trufort, Trafford* v. *Blanc* (1), give effect to the decision of this Court. In my opinion the appeal ought to be allowed.

KENNEDY L.J. I am of the same opinion. The English proceedings were started first. In these English proceedings the Court will recognize the law of domicil. There is no dispute as to that. The English proceedings will probably come to a conclusion before the Italian proceedings. I am not very clear as to the citation of persons abroad, but, whether their conclusion comes first or last, I see no reason in justice or convenience in taking away the prima facie right of the parties who commenced the English proceedings that they should be carried on to their natural end. Without doing an injustice to

(1) 36 Ch. D. 600.

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the Italian Courts, I cannot believe that if they find that our Courts have decided according to the law of domicil they will not respect a decision of the English Courts, just as, if the Italian judgment came first, we should respect the judgment of the Italian Courts. The document is not in doubt as a whole, it being a holograph document duly signed, nor is there, as it seems to me, any legitimate doubt as to what any Englishman would say was the meaning of any of the phrases in that document. We have a warning in one of the affidavits that in getting at the Italian version of it there might possibly be a mistranslation of an important phrase in the letter, and, therefore, it seems to me that, there being no dispute as to the Italian law, if we are to look at the end to be gained, which is a just result, or the cost at which that end is to be obtained, the preference is clearly to be given to the English proceedings. I am one of those who are very slow to interfere with the discretion of a judge of first instance, but I do think that, with great respect to the learned President, he did not give due weight to the fact that the English proceedings had been begun some time before the Italian proceedings, or to the fact that the bulk of the property is not in Italy, or, lastly, to the fact that if we compare the advantages of the one place over the other with reference to the particular question here in dispute and the probable expense, there is a clear balance in favour of the continuance of the English action.

Appeal allowed.

Solicitors; *Buxton, Ashton & Sons, for H. F. J. Banham, Royston*; *Walbrook & Hosken.*

H. C. R.

[IN THE COURT OF APPEAL.]

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May 4, 6; *July* 6.

SCOTT (otherwise MORGAN) *v.* SCOTT.

Divorce—Practice—Nullity—Hearing in Camera—Decree Nisi—Publication—Contempt of Court—Committal—Appeal—Criminal Cause or Matter—Error of Law apparent upon the Record—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.

The effect of an order that a case should be heard in camera is the same whether it is made in the Chancery Division or the Divorce Division, and the meaning of it is that the details of the hearing are not to be made public at any time without the leave of the Court, although the bare result may be published. The publication of the proceedings on a hearing in camera may be subject-matter of contempt and may be punished as such. An order to hear a case in camera is made by the Court for its own assistance and protection in the administration of justice, not to affect the civil rights of the parties; and an order for committal for breach of such an order is a judgment in a "crimina cause or matter" within s. 47 of the Judicature Act, 1873, from which an appeal to the Court of Appeal will not lie.

On a motion by the respondent in a nullity suit to commit for contempt of Court the petitioner and her solicitor for publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of the cause, in contravention of an order directing that the cause should be heard in camera, Bargrave Deane J. accepted the apologies of the petitioner and her solicitor and made no order upon the motion to commit them to prison, but directed that the costs should be paid by them jointly and severally. They appealed, and when the appeal came on for hearing the preliminary objection was taken that the order was made in a criminal cause or matter, and that under ss. 19 and 47 of the Judicature Act, 1873, no appeal would lie:—

Held by the Full Court of Appeal (Cozens-Hardy M.R., Vaughan Williams, Fletcher Moulton, Farwell, Buckley, and Kennedy L.JJ., Vaughan Williams and Fletcher Moulton L.JJ. dissenting), that the Court had jurisdiction to make the order to hear in camera; that the order was made to assist the Court in the administration of justice, not to affect the civil rights of the parties; that the order to pay costs was a judgment in a criminal cause or matter; that there was no "error of law apparent upon the record"; and that the appeal would not lie.

Appeal from an order of Bargrave Deane J. (1)

This was a motion, on behalf of Kenneth MacKenzie Scott, the respondent in a nullity suit, that Annie Maria Scott, otherwise Morgan, the petitioner in the said suit, and Percy Braby, her solicitor, be committed to prison for their contempt of

(1) [1912] P. 4.

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Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of the cause on June 13, 1911, which, the notice of motion stated, was "in contravention of an order, dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the petitioner and the said Percy Braby be restrained from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause, or from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that the petitioner and the said Percy Braby be directed to state on oath the names of the persons and their addresses to whom similar communications had been made; and that the petitioner and the said Percy Braby respectively be ordered to pay to the respondent his costs, as between solicitor and client, of and relating to this motion.

The notice of motion was dated November 23, 1911, and was addressed to Annie Maria Scott and to Percy Braby, and also to a partner of the latter, but at the hearing it was stated, and admitted, that the partner had, in fact, no part in the matter.

The material facts and dates were as follows:—

The petitioner and respondent went through the ceremony of marriage in July, 1899, and the petition for nullity on the ground of the alleged impotence of the respondent was presented by the lady on January 12, 1911.

On February 14, 1911, an order for medical inspection of the parties was made, and the order further directed that the case should be heard in camera.

The respondent had entered an appearance in the suit and filed an answer admitting that the marriage had not been consummated, but denying that he was impotent.

The petitioner attended for medical inspection, in pursuance of the order, and she was reported to be virgo intacta.

The respondent did not attend for inspection.

On April 28, 1911, the answer of the respondent was, by leave and with consent, withdrawn.

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The case was heard before the President (Sir Samuel Evans) in camera on June 13, 1911, and a decree nisi was then pronounced, on the ground of the respondent's impotence.

The motion for committal was heard before Bargrave Deane J. on December 4, 1911, when the petitioner and her solicitor apologized. The learned judge accepted their apologies and excuses and made no order upon the motion to commit them to prison, but ordered them to pay the costs jointly and severally. They appealed, and when the case came on for hearing before the Court of Appeal the preliminary objection was taken that the order was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873, and that an appeal would not lie.

Barnard, K.C., and *W. O. Willis*, for the appellants.

Danckwerts, K.C., and *Bayford*, for the respondent. There is a preliminary objection that an appeal will not lie from the President's order of December 4, 1911, to this Court. By s. 19 of the Judicature Act, 1873, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order "save as hereinafter mentioned"; and by s. 47, "No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record." This order was made in a criminal cause or matter; there was no "error of law apparent upon the record"; and there is therefore no appeal from the order to this Court. The order was punitive in its nature and such orders for contempt of Court have always been treated as made in criminal matters. The order that the case should be heard in camera was not made under any special jurisdiction of the Divorce Division. The usual procedure under r. 206 of the Rules and Regulations of December 26, 1865, was followed. All Divisions of the High Court have power to and frequently do make such orders. The order to hear a case in camera can be made even in invitum: *Ogle* v. *Brandling*. (1) The whole subject was considered in *D.* v. *D.* (2), and it was held by Jeune P. that there was an inherent right in the Divorce Court to hear cases in private, not merely as representing the practice of the old Ecclesiastical Courts in

(1) (1831) 2 Russ. & My. 688. (2) [1903] P. 144.

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nullity cases, or the practice in patent cases for the protection of secret processes, or in cases relating to wards of Court, but because justice could not be done unless the case was heard in camera: *A.* v. *A.* (1); *Malan* v. *Young.* (2) At one time it was doubted whether the Court had power to do this: *C.* v. *C.* (3); *H.* (*falsely called C.*) v. *C.* (4); but the question is now settled. By the Matrimonial Causes Act, 1857, the jurisdiction of the Ecclesiastical Courts was vested in the Divorce Court. The jurisdiction to hear cases in private is not questioned in any way in the Act. By s. 16 of the Judicature Act, 1873, the jurisdiction was transferred to the High Court of Justice, and the Probate and Divorce Division hears cases in camera by virtue of those general powers: *In re Pollard.* (5)

This is a criminal cause or matter. The publication of the note of the proceedings which were heard in camera by the express order of the Court was a criminal contempt of Court: *In re Martindale* (6); *Lawrence* v. *Ambery.* (7) The order appealed from was not made to enforce civil rights or exercise jurisdiction over the officers of the Court; it was a punitive order made for disobedience to an order of the Court, which had been made for the purposes of the administration of justice: *Seldon* v. *Wilde* (8); *In re Freston* (9); *O'Shea* v. *O'Shea and Parnell* (10); *Seaman* v. *Burley.* (11) Where an injunction is granted to restrain infringement of a patent and the defendant is committed for breach of that order an appeal lies, but that is because the order is not punitive, but is made in order to enforce the performance of an act.

Barnard, K.C., and *W. O. Willis*, for the appellants. This point is of vital importance to the parties in nullity suits, for if the preliminary objection succeeds they will in no circumstances be able to state the details of the trials. After the passing of the Matrimonial Causes Act, 1857, it was thought that there was no power to hear nullity cases in camera. The

(1) (1875) L. R. 3 P. & M. 230.
(2) (1889) 6 Times L. R. 38.
(3) (1869) L. R. 1 P. & M. 640.
(4) (1859) 29 L. J. (P. & M.) 29.
(5) (1888) 20 Q. B. D. 656.
(6) [1894] 3 Ch. 193, 200.
(7) (1891) 91 L. T. Journal, 230.
(8) [1911] 1 K. B. 701, 711.
(9) (1883) 11 Q. B. D. 545.
(10) (1890) 15 P. D. 59, 62.
(11) [1896] 2 Q. B. 344.

evidence was given in open Court, though the arguments were generally delivered in private. Sect. 46 of the Act was intended to prevent hearings in camera. It was in order to assist witnesses to give their evidence that orders came to be made to hear cases in camera. The protection of witnesses is a purely personal matter and has nothing in common with the jurisdiction with reference to wards of Court. There was no general power to order cases to be heard in camera: *Nagle-Gillman* v. *Christopher*. (1) The only people who required protection were the witnesses; and apart from their protection there was no power to enforce secrecy. If the order of February 14, 1911, had been intended to prevent the petitioner from communicating any details to her friends it should have been drawn in that form. There is no reported case in which an injunction has been granted to restrain a petitioner from divulging evidence. The appellants have not been guilty of any contempt; the order has been obeyed, for the cause was heard in camera. An appeal will lie to this Court, for the order for payment of costs was not in a "criminal cause or matter." It was a personal order in a civil matter; it was not of a punitive nature as in *In re Freston*. (2) There was no attempt by the appellants to interfere with the fair trial of the action as in *O'Shea* v. *O'Shea and Parnell*. (3) In that case it was pointed out that there were many forms of contempt which were not of a criminal nature. *Seldon* v. *Wilde* (4) is in favour of the appellants. A person who is committed for contempt for taking away a ward of Court can appeal to this Court: *Mozley-Stark* v. *Mozley-Stark and Hitchins*. (5) An appeal lies to the Court of Appeal against an order for an attachment for disobedience to a writ of habeas corpus: *The Queen* v. *Barnardo*. (6) The order that this case should be heard in camera was made at the request of the petitioner, not by the direction of the Court. It was not intended to impose silence on the parties.

Bayford in reply.

Cur. adv. vult.

(1) (1876) 4 Ch. D. 173.
(2) 11 Q. B. D. 545.
(3) 15 P. D. 59.
(4) [1911] 1 K. B. 701.
(5) [1910] P. 190.
(6) (1889) 23 Q. B. D. 305.

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July 6. The following written judgments were delivered :—

COZENS-HARDY M.R. This is an action instituted by a wife for a decree of nullity of marriage. The usual order was made that the cause should be heard in camera. It was so heard and a decree of nullity was granted. The wife and her solicitor obtained copies of the shorthand notes of all that took place at the hearing and sent copies so obtained to certain persons. A motion was made by the husband to commit them for contempt. Bargrave Deane J. held that they had been guilty of contempt, but accepted an apology from them. He made no other order than that they should pay the costs of the motion. From this order there is an appeal, and a preliminary objection is taken that under s. 47 of the Judicature Act, 1873, no appeal lies on the ground that the order was made in a criminal cause or matter.

It has not been argued before us that the order for hearing in camera was not within the jurisdiction of the learned judge. Since the year 1875 it has been the settled practice of the Divorce Court to direct nullity cases to be tried in camera : see *A.* v. *A.* (1) An order of this kind is not made merely because of a request from one or both of the parties, but because the Court considers it expedient that such cases should be so heard. This was in accordance with the practice of the old Ecclesiastical Courts. But since the Judicature Act a wider power is conferred upon the Court, and it was held by Sir Francis Jeune in *D.* v. *D.* (2) that the Court has power in suits for dissolution to hear the evidence in camera. This principle was adopted in the King's Bench Division in the case of *Malan* v. *Young* (3) by Denman J. after consulting some of the judges, and I see no reason to differ from that view.

The Court of Chancery has always, so far as I am aware, asserted and exercised this right in the case of wards of Court and lunatics, and also in other cases where publicity would defeat the object of the suit. In *Andrew* v. *Raeburn* (4) both Lord Cairns and James L.J. treated the matter as in the discretion of the Court, a discretion which, no doubt, should be jealously guarded

(1) L. R. 3 P. & M. 230.
(2) [1903] P. 144.
(3) 6 Times L. R. 38.
(4) (1874) L. R. 9 Ch. 522.

in view of the extreme importance in general of publicity. I cannot, however, bring myself to doubt that a nullity case is pre-eminently one in which publicity is undesirable and an order for a hearing in camera may most properly be made.

It remains to consider what is the effect of an order for hearing in camera. It must, as it seems to me, have precisely the same effect whether it is made by a judge of the Chancery Division in a case in which a ward is interested, or by a judge of the Divorce Court, whether it is made in accordance with the old ecclesiastical practice or under the powers conferred by the Judicature Act. In my opinion the meaning and intent of the order is that the evidence should not be made public at any time without the leave of the Court. It would be futile to say that though the public are not to be present at the hearing they may, when the hearing is over, be informed of all that has taken place.

I desire to adopt the language of North J. in *In re Martindale* (1) He said: "There may be, and are, publications which amount to contempts of Court, although they do not interfere with the course of justice, and have been committed when all proceedings are at an end—for instance, it would be idle to suppose that matters occurring with respect to a ward, which could not be published without contempt while the ward was an infant, could be published with impunity so soon as the ward had attained the age of twenty-one years." And again, "I cannot conceive a clearer contempt of Court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the Court had deliberately, in the exercise of its discretion, decided ought not to be published." I think, therefore, that the publication of the proceedings of a hearing in camera may be subject-matter of contempt.

There are many contempts for disobedience to orders which are not, in the words of Cotton L.J., contempts of a criminal nature. Such orders are in aid of or a step in enforcement of a civil right. *In re Freston* (2) and *O'Shea* v. *O'Shea and Parnell* (3) illustrate this. But in the present case there are no civil rights

(1) [1894] 3 Ch. 193, 200, 201. (2) 11 Q. B. D. 545.
(3) 15 P. D. 59.

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to be affected. The Court, for good reason, held it expedient that proceedings should be in camera. It is not material to consider whether the Court, in making the order, was influenced by considerations of public decency, or of the difficulty of obtaining evidence otherwise. It is sufficient to say that the Court, in the exercise of its undoubted power, thought fit for the protection of interests entrusted to its jurisdiction so to order. The publication of in camera proceedings is a clear defiance of the order of the Court and may properly be punished as such: see *Rex* v. *Clement*. (1)

In my opinion this was a contempt "of a criminal nature," and the order was made in a criminal matter. That being so, it is not competent for us even to consider whether the conclusion at which the learned judge arrived was or was not well founded. It is, of course, plain that it is not every publication of in camera proceedings which a judge dealing with a motion to commit would treat as a contempt. I may instance communications with professional advisers with a view to an appeal. And I may add that the Court always discourages motions to commit on slight grounds: *Plating Co.* v. *Farquharson*. (2) But in the case of a contempt "of a criminal nature" all such considerations are for the judge of first instance and not for the Court of Appeal. In my opinion the preliminary objection prevails and the appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. The question we have to decide in this case turns upon the interpretation of ss. 19 and 47 of the Judicature Act, 1873. [The Lord Justice read the sections, and continued):]

It is said that the proceeding before us is a proceeding in a criminal cause or matter, and the authority cited for this proposition is *O'Shea* v. *O'Shea and Parnell*. (3) The question raised in that case and in this is the question, Is there a right of appeal? Cotton L.J. says: "Many motions, very like the motion in this case, have been made from time to time, but the point now raised does not appear to have been dealt with,

(1) (1821) 4 B. & Ald. 218. (2) (1881) 17 Ch. D. 49.
(3) 15 P. D. 59, 62.

although in one case which has been cited before the other branch of the Court of Appeal, *Reg.* v. *Jordan* (1), a doubt was expressed by one of the judges whether any appeal would lie in such a case; but the Court decided the case without hearing the point argued. The present proceeding is for a contempt of Court. Of course there are many contempts of Court that are not of a criminal nature; for instance when a man does not obey an order of the Court made in some civil proceeding. to do or to abstain from doing something—as where an injunction is granted in an action against a defendant and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt. That is really only a procedure to get something done in the action and has nothing of a criminal nature in it. But is that so here? No doubt the notice of motion is so entitled in the divorce suit, but it is also entitled in the matter of an application against Tuohy (the appellant) and the essential part of the motion is the application to commit Tuohy for contempt."

With regard to the observation of Cotton L.J. that cases very like this have been dealt with in the Court of Appeal without objection, I would observe that in some of these cases, and I think nearly all of them, the objection could not have been raised, e.g., in *In re Freston* (2), in which, as pointed out by Buckley L.J. in *Seldon* v. *Wilde* (3), there was no question as to whether the proceedings were criminal, but only whether the process was mere civil process or whether the civil process was punitive.

Again in *Seldon* v. *Wilde* (3) itself, notwithstanding the fact that upon a motion to attach the defendant, a solicitor, for contempt of court in making default in delivering his bill of costs in pursuance of an order made by a judge in the Chancery Division that the defendant should deliver his bill of costs, and should pay to the plaintiff the amount of the costs when taxed, it was held that an action might be brought to enforce that judgment although the order upon which it was founded was punitive.

(1) [1888] W. N. 152; 57 L. J. (Q.B.) 483.
(2) 11 Q. B. D. 545.
(3) [1911] 1 K. B. 701, 706.

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It is to be observed that in the case before us the summons and order there appealed against are both headed:

"*In the High Court of Justice*
Probate, Divorce and Admiralty Division
(*Divorce*)
Between Annie Maria Scott (otherwise Morgan)
Petitioner
and
Kenneth MacKenzie Scott
Respondent."

There is no heading in the matter of the person against whom the application is made as there was in *O'Shea* v. *O'Shea and Parnell.* (1)

If the present case is really a criminal cause or matter this omission from the proper form would clearly be material as to the nature of the proceedings. Cotton L.J. clearly thought so, if the respondent is a stranger. The judgment of Cotton L.J. does not go farther than this, but in my opinion the logic of his decision extends to a case where pending a civil action, criminal as distinguished from civil procedure is set in motion by a summons against a party to a civil action to punish him for criminal contempt.

So far as the authority of the case extends it deals only with a case where the criminal act done was an act done by a stranger to the action and was an attempt to interfere with the administration of justice outside the action. The proceeding, says Lopes L.J. (2), commenced with the proceeding against Tuohy and ended with his punishment. The contempt of Tuohy could not be described as having nothing criminal about it. It was plainly criminal contempt and required strict compliance with criminal procedure, whether the proceeding was by indictment or by summons taken out by way of summary procedure.

The next point I propose to consider is whether the case before us is really a case of criminal procedure at all, even assuming the proper steps have been taken and forms followed to constitute the procedure adopted in this case a case of criminal procedure in the sense of those words as used in s. 47.

(1) 15 P. D. 59. (2) 15 P. D. 59, 65.

To begin with, there seems to me to be absolutely nothing on the face of the summons and order to indicate that the question dealt with by the Divorce Court in this case arose in a criminal trial, except the fact that the order purports to inflict a punishment on the petitioner for an alleged breach of the order "that this cause be heard in camera," the punishment being that the petitioner and her solicitor were ordered to pay the costs of the application.

The mere fact that an order in civil process inflicts a punishment does not make it criminal: see judgment of Buckley L.J. in *Seldon* v. *Wilde* (1) and the cases therein cited.

Sect. 47 is not a model of clear drafting. It might be urged that s. 47 applies exclusively to the Court for Crown Cases Reserved, but, as pointed out by Lindley L.J. in *Ex parte Alice Woodhall* (2), "the true construction is that put by Mellish L.J. in *The Queen* v. *Steel* (3)," where he said: "No doubt the first part of the section refers to the Court for Crown Cases Reserved; but it goes on and says that no appeal shall lie from any judgment of the said High Court in any criminal cause or matter. Are you to confine this to the Court for Crown Cases Reserved, or is it general, extending the exception or exemption from appeal to all criminal causes or matters? I am clearly of opinion that it is general, and that the saving clause was necessary to retain the former rights of appeal for error on the record. If this were not so there would be an appeal from the Court of Queen's Bench, not only on every judgment, but on any order in a criminal case. The intention of the latter part of s. 47 was to prevent this; and there appears no reason, but the contrary, why the words 'no appeal shall lie from any judgment of the said High Court in any criminal cause or matter,' should be confined, as the appellants contend, to the High Court when sitting as a Court for the consideration of Crown Cases Reserved."

As an instance of what is a criminal case within the meaning of s. 47 I will take the application for habeas corpus in the case of *Ex parte Alice Woodhall.* (4) That case it will be observed was a

(1) [1911] 1 K. B. 701. 59 L. T. 841, 842.
(2) (1888) 20 Q. B. D. 832, 837; (3) (1876) 2 Q. B. D. 37.
(4) 20 Q. B. D. 832; 59 L. T. 841.

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criminal cause or matter within s. 47, for the decision, in respect of which the Court of Appeal held that there was no appeal, was plainly a criminal cause or matter in its initiation, for it was a decision upon an application to obtain the discharge from custody of a person committed to prison under s. 10 of the Extradition Act, 1870, which section applies "in the case of a fugitive criminal accused of an extradition crime." It was a matter dealt with by a magistrate, a person conversant with criminal law and competent to decide what is sufficient evidence to justify a committal. Bowen L.J. says in his judgment in *Ex parte Alice Woodhall* (1), "how can the matter be other than criminal from first to last"; and later, "the questions upon which the application for a writ of habeas corpus depend are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter. I will only add that upon the facts in this case I entirely agree that we ought not to interfere with the magistrate's order."

It is to be observed that the application for a writ of habeas not being necessarily an application in a criminal matter, Bowen L.J. examines the antecedent facts before he decides that the application for the habeas was an application in a criminal matter. So here in my opinion we must examine the antecedent facts before we can justly hold that the order appealed against was an order made in a criminal cause or matter. It is an order in fact made on a summons in the course of a purely civil proceeding and did not become an order in a criminal cause or matter merely because it inflicted a punishment for contempt in disobeying such order. But I am not here saying that such disobedience might not by a properly entitled summons and order in an independent proceeding constitute an order made in a criminal cause or matter.

(1) 20 Q. B. D. 838; 59 L. T. 842.

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Moreover, although if the order was made in a criminal cause or matter the construction of the order would rest with the judge or judges of the Court in which the order was made, yet in my opinion the Court of Appeal, acting on the saving clause of s. 47 (which, as Lindley L.J. says in his judgment in *Ex parte Alice Woodhall* (1), was necessary to retain the former rights of appeal for error on the record), would have the right and the duty to consider whether in this case, assuming the case to be in any sense a criminal cause or matter, the proceedings did not disclose error on the record such as want of jurisdiction or irregularity in a criminal case.

I will consider what grounds, if any, there are in the present case for saying that there is error on the face of the proceedings. Now the course of proceeding in this case was this: That the petitioner, Annie Maria Scott, presented a petition on January 12, 1911, for nullity of marriage on the ground of the alleged impotence of her husband, the respondent. The respondent entered an appearance in the suit and filed an answer admitting the marriage had not been consummated, but denying that he was impotent. The summons for the appointment of medical examiners, and also to shew cause why this cause should not be heard in camera, was taken out by the petitioner against the respondent. The order in form was an order for the appointment of inspectors to examine the organs of generation of the husband and wife, and concluded with these words: "And I do further order that this cause be heard in camera." These words are the only words in reference to the hearing in camera. The petitioner attended the inspection and the respondent did not. The petitioner was reported to be virgo intacta. Subsequently on April 28, 1911, the answer of the respondent was by leave and with consent withdrawn. The case was heard before the President (Sir Samuel Evans) on June 13, 1911, and a decree nisi was then pronounced on the ground of the respondent's impotence. On December 4, 1911, the respondent moved by a notice of motion in the Probate, Divorce and Admiralty Division in the following words:—

(1) 20 Q. B. D. 837.

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"*In the High Court of Justice*
Probate, Divorce and Admiralty Division
(Divorce)
Between Annie Maria Scott (otherwise Morgan)
Petitioner
and
Kenneth MacKenzie Scott
Respondent.

"Take Notice that this Honourable Court will be moved on Monday the 4th day of December 1911 at 11 o'clock in the forenoon or so soon thereafter as counsel can be heard by counsel on behalf of the respondent that the petitioner Annie Maria Scott and Percy Braby and Alexander Mortlock Waller be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of this cause on the 13th day of June 1911 in contravention of an order dated the 14th day of February 1911 directing that this cause be heard in camera. And that the said petitioner and the said Percy Braby and the said Alexander Mortlock Waller be restrained from making any similar or other communications either directly or indirectly concerning or relating to the subject-matter of this cause or from otherwise molesting the respondent his relatives and friends doctors and patients and others. And that the petitioner and the said Percy Braby and the said Alexander Mortlock Waller be directed to state on oath the names of the persons and their addresses to whom similar communications have been made.

"And that the petitioner and the said Percy Braby and Alexander Mortlock Waller respectively be ordered to pay to the respondent his costs as between solicitor and client of and relating to this motion.

"And that such further order be made herein as may be just.

"Dated the 23rd day of November 1911.

"Wm. S. Jerome
"40 High Holborn W.C.
"Solicitor for the Respondent

To
Annie Maria Scott and
to Percy Braby and Alexander Mortlock Waller."

The petitioner admits that she caused to be sent a typewritten copy of an official transcript of the shorthand notes of proceedings in this suit to Thomas G. Scott, the father of the respondent, and that she sent to Mrs. Westenra, the sister of the respondent, and to one other person similar copies, but denies having sent similar communications to any other person. The judgment of Bargrave Deane J. deals only with part of the motion, which charges publication of the transcript of the shorthand writer's note of the hearing, and does not deal with that part of the motion which asks for restraint of the petitioner from making communications directly or indirectly concerning or relating to the subject-matter of this cause, "or from otherwise molesting the respondent, his relatives and friends, doctors, patients and others." The petitioner in her affidavit of November 30, 1911, alleges that she sent the transcript to vindicate her character against false reports to her prejudice, which led to her separation from the respondent. The respondent by his affidavit of December 4 answers the affidavit of the petitioner and complains, in answer to paragraphs 3 and 7 of the petitioner's affidavit, that the petitioner on June 22, 1911, caused to be inserted in *The Times* newspaper in a personal column, and in the *Weekly Scotsman* in a society gossip column, and also in the *Morning Post* the following advertisement:—"Mrs. Kenneth Scott having obtained from the Court an annulment of her marriage (decree nisi) will be known in future as Mrs. Morgan Scott."

I have set out the notice of motion to shew how plain it is that the motion was a motion in the action and not an independent motion in a criminal cause or matter.

I think it is worth while to mention a few cases since *Reg.* v. *Steel* (1) and *Ex parte Alice Woodhall* (2) and *Reg.* v. *Jordan* (3) (insulting a judge), and I shall attempt to distinguish between contempts which are criminal and those which are not criminal, and between simple disobedience to civil process and disobedience to process which though issued by a party in the exercise of a legal right partakes of a punitive or disciplinary nature, and I shall do this with the object of defining which of

(1) 2 Q. B. D. 37.
(2) 20 Q. B. D. 832.
(3) [1888] W. N. 152; 57 L. J. (Q.B.) 483.

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these cases are within the word "criminal" in s. 47 of the Judicature Act of 1873 and which are not.

In the class of cases which are criminal one finds, first of all, those cases where the Court has fined or imprisoned for contempt of Court in the face of the Court, or where there have been publications calculated to bring the Court or the judge into contempt. In all these cases of insult to the Court it is the Court and the administration of justice which are insulted, and the proceedings for contempt are in no sense a step in the action. Lord Russell C.J., in speaking in *Reg.* v. *Gray* (1) of a contempt, consisting of personal scurrilous abuse of a judge in a newspaper, says: "I repeat that it is personal scurrilous abuse of a judge as a judge. We have, therefore, to deal with it as a case of contempt, and we have to deal with it brevi manu. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction, the history, purpose, and extent of which are admirably treated in the opinion of Wilmot C.J., then Wilmot J., in his Opinions and Judgments." (2)

The next class of contempts are contempts in procedure which consist in disobedience by a party to an action to the orders or process of the Court. Such contempts are not generally criminal even though the motion for committal asks for and obtains a punitive order: see *Seldon* v. *Wilde.* (3)

I do not think myself that s. 47 in so far as it excludes an appeal applies to what have been called quasi-criminal cases, or cases akin to criminal cases. Sect. 47 of the Judicature Act, 1873, deals with criminal causes and matters, and the very expression "quasi-criminal" indicates that the case spoken of is not a criminal case.

Amongst the objections constituting error upon the face of the record I will first mention the question of jurisdiction to make an order in camera in a case of nullity of marriage. The authorities at least shew that up to 1873, in which year Jessel M.R. delivered his judgment in *Nagle-Gillman* v.

(1) [1900] 2 Q. B. 36, 40.

(2) *Rex* v. *Almon* (1765) Wilmot's Opinions, 243.

(3) [1911] 1 K. B. 701.

Christopher (1), the jurisdiction to make an order for a hearing in camera, even with the consent of the parties, was limited to cases "affecting lunatics or wards of Court, or where a public trial would defeat the object of the action, as was suggested in *Andrew* v. *Raeburn* (2), or those cases where the practice of the old Ecclesiastical Courts in this respect is continued." Indeed in *Andrew* v. *Raeburn* (2) it was doubted whether the jurisdiction to order a case to be heard in camera ought to be exercised in any case where it had never been exercised before. Yet it was argued before us that since 1873 there has been a considerable enlargement of the area of cases in which an order for hearing in camera can be made. The authorities cited however are few and, such as they are, are by no means conclusive.

The first case relied on was *Malan* v. *Young* (3), in which Denman J. held that he had power to hear the case in camera notwithstanding the protest of a barrister in Court. I find, however, in the Annual Practice, 1912, at p. 566 these words: "The following subsequent occurrence is however unreported:— The trial proceeded in camera on 11th, 12th and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded Note of the Case)." Compare, however, *D.* v. *D.* (4), which I cite hereafter. I wish to add that the circumstances in the main are within my personal knowledge and recollection, and I can therefore confirm the statement in the Annual Practice.

The next case is *In re Martindale* (5), which was a case concerning a female infant who had been made a ward of Court. North J., in making an order against the respondent

(1) 4 Ch. D. 173.
(2) L. R. 9 Ch. 522.
(3) 6 Times L. R. 38.
(4) [1903] P. 144.
(5) [1894] 3 Ch. 193, 202.

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on a motion to commit for contempt in publishing matters heard by the Court in private, uses these words, speaking of *Lawrence* v. *Ambery* (1), which was a case in which it was held that there was no serious contempt because the publication only announced that the ward had become the wife of the respondent: "The contempt was in purporting to give the public information, though meagre, of what the judge had decided ought not to be disclosed, by determining to hear the case in private and excluding the public," which looks perhaps as if the learned judge thought there was a general power to order a case to be heard in camera at the discretion of the judge. There is, however, no statement to that effect.

Again, Sir Francis Jeune in *D.* v. *D.* (2) says: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public." Sir Francis Jeune decided in *D.* v. *D.* (2), which was a case in which the wife sued for judicial separation, the particulars in which disclosed allegations of filthy practices, and the husband sued for divorce on the ground of adultery, that he had power to order the case to be heard in camera. I would remark on this that at the date when the ecclesiastical practice first came into force, and for a considerable time afterwards, the evidence even in Courts of Equity was taken in camera and could not be disclosed until the order for publication for the purposes of the trial: see 3 Blackstone's Commentaries, 449.

Having arrived at this conclusion, Sir Francis Jeune says (3): "In cases of dissolution of marriage, the power to try which in this Court is derived from the Matrimonial Causes Act, 1857, no power has been conferred by that statute to hear such cases in camera. But the practice of other Courts in this country should, in my opinion, be followed here." These, I believe, are all the authorities.

These authorities, as I have said, do not, in my opinion,

(1) 91 L. T. Journal, 230. (2) [1903] P. 144, at p. 148.
(3) [1903] P. at p. 148.

come to much. *Malan* v. *Young* (1) has never been regarded by the profession as an authority.

In re Martindale (2) is only an authority in respect of the jurisdiction of the King as parens patriæ in respect of wards, and *D.* v. *D.* (3) is based entirely on an assumed general right of all Courts and judges to hear any case in their discretion in private, a proposition for which there is, as far as I know, no authority, and which is utterly inconsistent with the decision of Jessel M.R. in *Nagle-Gillman* v. *Christopher*. (4)

I would further add that although Sir Francis Jeune quotes s. 85 of the Matrimonial Causes Act, 1857, he does not quote s. 46, which runs thus: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

In the proceeding in this case, which, it is argued, was a proceeding for criminal contempt, even if the witnesses were examined in a sense in open Court, and the proceedings were in open Court, yet the contempt alleged is disobedience to an order made by the Court after a hearing in camera at which the witnesses were not examined in open Court, and the question arises whether this is error vitiating the order. The section applies to all cases in the Divorce Court, and there can be no doubt but that to my mind, having regard to the cases cited in the note to ss. 46 and 47 in Chitty's Statutes, subject to "such rules and regulations as may be established as herein provided," the provision that the witnesses shall be sworn and examined orally applies generally to all cases in the Divorce

(1) 6 Times L. R. 38.
(2) [1894] 3 Ch. 193.
(3) [1903] P. 144.
(4) 4 Ch. D. 173.

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Court. The Divorce Court has, however, in practice made some exceptions. I have two observations to make on these exceptions—(1.) that it would seem from the case of *McKechnie* v. *McKechnie* (1) the Divorce Court has a discretion to allow cases to be proved by affidavit, but it is stated in Browne and Powles' Law and Practice of Divorce that the early cases in which it has been allowed to prove the whole case by affidavit have not been followed, and this appears to be proved by the cases in the notes appended to the report of *McKechnie* v. *McKechnie*. (1) In the book by Browne and Powles it is stated, p. 235, immediately after the above cited passage: "But the instances where a petitioner has been allowed to prove his or her case partly by affidavit have not been uncommon"; no authorities are, however, cited for this proposition. (2.) That the effect of ss. 19 and 47 of the Judicature Act, 1873, is that the saving in s. 47 of appeal in respect of error apparent on the record applies only to criminal cases, so that in a civil cause or matter error on the record does not apply. This would make the order in this case good as an order in a civil case, which I think it was, but bad if the case was a criminal case.

Fletcher Moulton L.J. has fully dealt with the question of jurisdiction in his judgment which he has submitted to his colleagues.

I have thought it right to refer to the point, but I do not found my judgment on the affirmation of the proposition that the power of a Court or judge to make an order for hearing in camera is nowadays governed by the limitations mentioned in the judgment of Sir George Jessel in *Nagle-Gillman* v. *Christopher* (2), but I do feel that the hearing of trials in public is so precious a characteristic of English law that it is important that the power to hear cases in camera, even by consent, should be limited by express specific limitations and not left to the unfettered discretion of the Court or judge, and feel so the more if the breach of a simple order to hear in camera is to be treated as a criminal offence unappealable as falling within the words "criminal cause or matter" in s. 47 of the Judicature Act of 1873.

(1) (1858) 28 L. J. (P. & M.) 31.

(2) 4 Ch. D. 173.

I base my judgment rather on the ground that on the face of the documents constituting the record in this case, coupled with the facts, it is impossible that publication or disclosure of the evidence taken at the hearing in camera after the conclusion of the case should constitute a criminal cause or matter, except perhaps in cases of wards and lunatics in which the jurisdiction of the Court is the jurisdiction of the King as parens patriæ. The order to hear in camera is in terms limited to the "hearing." It is admitted that the result of the hearing may be published even by the newspaper press without any contempt of Court, but, irrespective of this allowable disclosure after the hearing in camera, I am of opinion that in every criminal cause or matter the charge must be stated with precision. Whether the trial is of an indictable offence or a cause or matter disposed of by the statutory summary jurisdiction of the Court or judge, the charge must be stated with precision and accuracy, and the order the breach of which constitutes the criminal offence must disclose an offence inconsistent with the terms of the order. If one takes by way of example a proceeding against a man for contempt by obstructing or interfering with the course of justice, the summons or notice of motion must be duly served and must state in terms the offence. In the same way if the proceeding is for contempt in disobeying an order, whether to do something or to abstain from doing something, the notice of motion must state the order and the offence, and if the offence stated is not a breach of the order recited there is error on the face of the proceeding, the indictment is open to demurrer and may be quashed, or the objection may be taken in shape of being error on the record.

The observations of Cotton L.J. in *O'Shea* v. *O'Shea and Parnell* (1) as to the proper title of the proceeding illustrate this. In *Reg.* v. *Gray* (2) the Attorney-General in support of the case appeared on a summons against Gray entitled in the matter of Gray, which stated in precise terms the offence charged. I may mention here that if there is an indictment for obstructing the course of justice, the indictment in effect alleges that the obstruction is wilful because it alleges that the

(1) 15 P. D. 59. (2) [1900] 2 Q. B. 36.

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obstruction or interference was malicious, and in cases of criminal contempt the disobedience in my judgment must be wilful if the contempt is to be treated as criminal.

I think that the order in this case was an order in a civil proceeding inter partes and not a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and that this appeal must be allowed by overruling the preliminary objection and hearing the appeal.

FLETCHER MOULTON L.J. In this case Annie Maria Scott, one of the appellants, instituted a suit of nullity of marriage against the respondent, Kenneth MacKenzie Scott, on the ground of his impotence. The petitioner and the respondent went through the ceremony of marriage on July 8, 1899, and the petition was presented on January 12, 1911, after an interval of more than eleven years. The petition alleged that the marriage had not been consummated. On February 9, 1911, the usual summons was taken out by the petitioner for an order for medical inspection of the parties, and in accordance with the ordinary practice that summons also asked that the case should be heard in camera. On February 14 an order was made in the terms of that summons. The respondent in his answer admitted that the marriage had not been consummated, but denied the alleged impotence. He did not, however, submit himself to examination, and subsequently applied for and obtained leave to withdraw his answer.

The case was accordingly heard in camera as an undefended case on June 13, 1911, the respondent putting in no appearance at the trial. The proceedings were of the simplest character. Counsel for the petitioner opened the facts shortly and put the petitioner in the box. She gave evidence that the marriage had not been consummated, and also explained the only peculiar point in the case, namely, that a separation deed had been executed by both parties in August, 1909, prior to the institution of the suit. With regard to this she stated that it was executed by her in ignorance that any other remedy was open to her. The surgeon who had examined her in pursuance of the order above referred to was called to prove that the petitioner was virgo intacta. The decree was then pronounced.

Shortly after the hearing of the cause the petitioner obtained a copy of the shorthand notes of the trial. It was procured for her in the ordinary way from the official shorthand writer by her solicitor, Percy Braby, who is the other appellant. She sent one copy of these shorthand notes to the respondent's sister and one to an intimate friend; and her solicitor, by her instructions, sent one to the respondent's father. I do not think it is material to the questions before us, but if it has any bearing upon them, I have not the slightest hesitation in finding that this was done solely in defence of her conduct and for the purpose of putting herself right with these parties, with whom she had always been on very friendly terms. The notes contained nothing whatever that was objectionable from any point of view, and they constituted an exact and incontestable account of all that had occurred. In my opinion her sending out these copies was a natural and proper thing for her to do and was instigated by no malicious or unworthy motive and evidenced no desire or intention to give general publicity to that which passed at the hearing of the case, and did not in fact do so.

On December 4, 1911, the respondent applied to the Court by motion to commit the petitioner and her solicitor, Percy Braby, and Alexander Mortlock Waller to prison for contempt of Court in "circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of this cause on June 13, 1911, in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera." The notice of motion further asks for an injunction restraining them from making any similar or other communications either directly or indirectly concerning or relating to the subject-matter of the cause or otherwise molesting the respondent or his relatives, friends, &c., and that the petitioner and her solicitors should be directed to state on oath the names and addresses of the persons to whom similar communications had been made, and that they should be ordered to pay costs.

Both parties filed affidavits, but the only relevant matters appearing therein were the facts which I have already stated. It was proved and not contested that Mr. Waller (who was partner

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to Mr. Braby) had had nothing whatever to do with the matter. Mr. Braby admitted that on the instructions of his client he obtained the transcript and caused the three copies to be made, and forwarded one of those copies to the respondent's father. The petitioner admitted having given the instructions to do so to Mr. Braby and having herself sent the other two copies as described (and no others), and she stated her reasons for so doing. In conclusion she says in her affidavit: "I submit that I have not contravened the order dated the 14th day of February, 1911, directing that the cause be heard in camera. Such order did not forbid me to give a true and faithful account of the proceedings to friends or relations either of mine or of the respondent's if I found it necessary in defence of my own reputation to do so. The only way of giving a strictly truthful account of the proceedings was to give a transcript of the shorthand notes."

On the hearing of the motion Bargrave Deane J. at once called on counsel for the respondents to excuse their clients' conduct, treating it as an unquestionable and gross contempt of Court. On the above facts, none of which were in contest, he found the petitioner and Mr. Braby guilty of contempt of Court. In his judgment he lays down the proposition that it is gross contempt of Court to report anything heard in camera and extends the proposition to summonses heard in chambers. On the ground that he thought that it had been done in ignorance he made no order to commit the petitioner or her solicitor to prison, but ordered them to pay costs jointly and severally. He however plainly states that in future there will be no excuse either for parties or solicitors if they do the like.

This is the order appealed from. On the hearing before us counsel for the respondent has taken the point that there is no appeal because it is a criminal cause or matter. The issues are plain enough and ought to be regarded in all their breadth. The judgment asserts that judges may commit for contempt of Court any person whether he be a party or a solicitor's clerk, (or I suppose counsel,) who speaks of what has passed at the hearing of any summons in chambers, and the respondent calls on us to decide that we cannot listen to any appeal against such an order because it is "a judgment in a criminal cause or matter."

Before I examine into the grave questions here raised I wish to call attention to two preliminary points which must be kept in mind. First, this case has nothing to do with a matter which has recently attracted much attention, namely, publishing unsavoury details of cases in public print. The appellants are not charged with any wanton publication of that kind. That which the judge denies to them is the right to communicate to any one whatever, whether relative or friend or adviser, anything that has passed at the hearing. He asserts that the order that the cause should be heard in camera condemns them to perpetual silence on all these matters.

Secondly, the parties to this case are adult litigants who are persons sui juris, and the questions for our decision relate to the powers of the Court over such persons. I call attention to this because I wish to make it clear that none of my remarks are intended to apply to matters relating to the special jurisdiction of the Court over wards of Court or lunatics. It has long been the practice of the Court of Chancery to hear matters relating to such persons in camera, but that is in the exercise of a wholly different jurisdiction to that which exists in the case of litigants. It is a special jurisdiction of an almost paternal type based on the principle that the Court is in fact their guardian. In considering the nature and limits of such a jurisdiction, special considerations arise which do not concern us here. It may well be, for example, that the Court has authority to put the obligation of future silence upon a ward or upon some one who has been guilty of contempt of Court by interfering with a ward, or upon a guardian in respect of matters affecting the ward, and that in proper cases it will do so. But this is solely a personal jurisdiction arising out of the position in which such persons stand to the Court. Wards of Court and lunatics are not sui juris and the Court is their guardian and has always claimed and exercised wide discretionary and other powers as flowing from that guardianship. But even in such cases the jurisdiction is limited to proceedings by way of summons. If an action is directed to be brought in respect of matters relating to a ward or a lunatic it is heard in open Court just as any other action would be. There is no analogy between matters coming within such a quasi-parental jurisdiction and

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actions or suits in the High Court. The parties here stand in no such relation to the Court. They are persons who are sui juris and who are merely asserting or defending their rights and are capable of so doing. But while I wish to make it clearly understood that the language of this judgment is not to be taken to refer in any way to the jurisdiction or powers of the Court of Chancery in cases relating to wards of Court or lunatics, it must not be understood that even in such cases I accept the view that the Court has the power to enjoin a secrecy which is unlimited as to time and indiscriminate as to persons such as the learned judge has declared to exist in judges of the Probate Division. For instance, I am satisfied that the Court could not compel wards to keep silence as to proceedings before the Court after they had attained their majority, and I am equally satisfied that it could not enjoin silence at all upon an accused party who had successfully shewn that he had been guilty of no interference with the ward and therefore had been wrongly summoned before it.

The preliminary objection that the order in question in this case is not subject to appeal purports to be based on the provisions of the Judicature Act, 1873. By s. 19 of that Act it is provided as follows: "The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court, or of any judges or judge thereof, subject to the provisions of this Act." It is common ground that this would give an appeal in the present case unless it comes within the exception to be found in s. 47 of the same Act. That is the section which transfers to the judges of the High Court of Justice the whole of the jurisdiction with regard to questions of law arising in criminal trials which was previously vested in the common law judges, and it provides that their determination of any such question shall be final and without appeal. So far the section has no relation to anything excepting the functions of the old Court for Crown Cases Reserved. It then goes on as follows: "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the

consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign," which was the Act constituting the Court of Crown Cases Reserved.

The intention of the section is clear. There were two ways of raising questions of law arising in criminal trials—the one where the error was apparent on the face of the record, in which case there was an appeal as of right to the Exchequer Chamber and from it to the House of Lords; and the other where a point of law was raised at the trial and was decided by the Court of Crown Cases Reserved. It was evidently intended by the section to preserve but not to increase those powers of appeal, the only alteration made being that the judges of the High Court were substituted for the judges of the Queen's Bench, Common Pleas, and Exchequer in the formation of the Court of Crown Cases Reserved. But in interpreting the section we must of course be guided by the actual language used, and therefore if there be other decisions which come within the words of the section, i.e., are "judgments of the said High Court in any criminal cause or matter," they likewise will not be subject to appeal except for some error of law apparent upon the record. But in considering this question the main object of the section should be borne in mind; and further it must not be forgotten that the exception relates only to a "judgment" of the High Court, whereas the general provisions as to the right of appeal cover any "judgment or order." This difference in language in the two sections is in my opinion not accidental. If we examine the matters dealt with in the other portions of s. 47 we shall find that they are all final judgments in criminal cases, and I can see nothing in the language of the section to lead me to think that it is intended to deal with any other matters. In my opinion the language of the section shews that it applies exclusively to the criminal jurisdiction of the High Court in which it is dealing with acts which by the law of the land are criminal and which it is asked to punish as such by judgment after trial.

The decisions of the Court of Appeal since the Judicature Acts came into operation shew that it has consistently followed this interpretation of the section. Very shortly after the coming into effect of the Judicature Act it was settled that an order to commit

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for contempt of Court for breach of an injunction or other order of the Court was not a criminal cause or matter within the meaning of the section. This has become unquestioned law and the hearing of such appeals is part of the regular practice of the Court of Appeal. I may perhaps give an example frequently occurring in my practice at the Bar. When a patent had been supported and an injunction granted against the defendant upon it, it was the common practice to apply to commit for breaches of that injunction where it could be shewn that the defendant had not ceased to infringe, and appeals from orders made upon such motions were regularly heard by the Court of Appeal and in some cases by the House of Lords. In the argument of the present appeal there was some very loose talk as to such appeals. It was suggested that they were merely motions to enforce the performance of an act and not motions to the Court to punish disobedience. Nothing could be more inaccurate. If deliberate disobedience to the order of the Court could be proved the Court could and in some cases did punish by imprisonment. Even if the disobedience was not shewn to be deliberate it punished the party by ordering him to pay the costs of the motion as has been done in this case. These applications for attachment or committal for disobedience to orders of the Court were both in form and substance applications to the Court to punish the defendant for his misconduct. But that did not make them motions in a criminal cause or matter. The reason is obvious. No order made by the Court can create a new crime. It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and such punishment may in proper cases include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal.

That the consistent practice of the Court of Appeal in this

respect is based on the principle which I have indicated is made more evident by the decision in the only case in which the Court has refused to hear an appeal from an order punishing an individual for contempt of Court. The case is *O'Shea* v. *O'Shea and Parnell.* (1) This was an appeal against an order of attachment against James Tuohy for contempt of Court in publishing an article in the *Freeman's Journal* commenting on the conduct of Captain O'Shea, the petitioner in a pending suit against his wife for dissolution of marriage. A Court of first instance decided that it was a contempt of Court and had ordered that a writ of attachment should be issued against him unless he should within a fortnight pay a fine of 100*l.*, and had further ordered him to pay the costs as between solicitor and client. The Court of Appeal refused to entertain the appeal, and there were good grounds for their so doing. As Cotton L.J. points out, the original application before the Court of first instance was not a proceeding in the suit at all and it was headed (as it ought to have been) in the matter of the delinquent himself. It was not in respect of his disobedience to any order made by the Court, but in respect of a criminal act well known to the law, namely, interfering with the administration of justice by the Courts. This is a crime at common law. It may take various forms having different degrees of aggravation, but they are all alike in their essence. In that case it was the publication of an article tending to prejudice the fair trial of the suit. Had it been organizing a band to intimidate witnesses on their way to the assizes, or attacking or threatening the judges, it would only have been an aggravated example of the same offence. The criminal cause or matter in that case commenced with the motion to commit Tuohy for that criminal act and ended with an order that he should pay the fine and costs or go to prison. This order finally terminated the proceedings and may fairly be regarded as a final judgment. It will be noticed that all the Lords Justices point out that the application is not made in the suit. The whole decision is summed up in the words of Lindley L.J. (2) : " The proceeding is a summary conviction for a criminal offence, and therefore no appeal lies."

(1) 15 P. D. 59. (2) 15 P. D. 64.

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The present appeal is against an order finding the appellants guilty of contempt of Court for disobedience to an order made in a civil suit. It therefore comes directly within the decisions and the settled practice of the Court of Appeal to which I have referred. The respondent contends, however, that this case constitutes an exception to the rule by reason of the nature of the original order and of the breach alleged to have been committed. To do justice to this contention it will be necessary to examine the terms of the original order and the nature of the acts which are found by the learned judge to constitute a breach of it.

For this purpose it is sufficient to look at the notice of motion upon which the order appealed against was made. It asks that the appellants may be committed to prison for their contempt of Court in circulating a copy of the shorthand notes of the hearing in contravention of an order directing that the cause be heard in camera.

Here the error of the learned judge becomes apparent. He has put an entirely wrong interpretation upon the order that the cause should be heard in camera. That order meant precisely what its words express, i.e., that the hearing should not be in open Court, but in what is the equivalent of the chamber of the judge. To the one the public have the right to come, to the other they have not. The effect therefore is to secure privacy at the hearing. But as its words shew, the order related to the hearing and the hearing only, just as much as does an order that the hearing of a cause shall be before a judge only or before a judge and jury. It follows that when the hearing was concluded the operation of the order was exhausted. Consequently all the talk about a "criminal breach" of the order (even if there could be such a thing in the case of an order made in a civil action) becomes meaningless. The alleged breach of the order is no breach at all. The notice of motion for contempt of Court is bad in law on the face of it, just as would be an indictment for burglary in which the facts alleged amounted only to larceny in the street. From a legal point of view it might just as well have prayed that the appellants might be committed for contempt of Court because "in contravention of

an order that the case should be heard in camera they had acquired the habit of taking snuff."

I somewhat resent being called upon to give reasons why we should interpret an order according to the plain meaning of the words, more especially in a case where it is sought to punish any one for an alleged disobedience of that order. It appears to me that the onus is upon those who contend that it bears some other meaning, and the respondent has wholly failed to discharge that onus. But the issues in this case are too serious for me to content myself with thus pointing out that the onus of proving that it bears another meaning rests upon those who put it forward, and that they have not discharged that onus, and I shall proceed to shew that an order that a cause shall be heard in camera never could have and never has had the meaning contended for by the respondent. Before doing so I wish to say a word about the two interpretations themselves. It has become evident to me in the course of the argument that there is much confusion of thought as to their respective effects and that the radical difference between them has often been forgotten. The language of the order provides for privacy at the hearing. It has nothing to do with secrecy as to the facts of the case. The learned judge interprets it as enjoining such secrecy. He realizes that having done so he is logically compelled to put all hearings in chambers on the same footing, and he therefore declares that under the procedure of our Courts there is an absolute obligation to perpetual secrecy as to what passes at the hearing of all summonses in chambers. No one has ventured to say before us a single word in defence of this part of the judgment. It is not too much to say that it is ludicrously at variance with the actual practice. Many thousands of summonses in actions are heard in chambers in the course of each year, and during all my experience at the Bar and on the Bench I have never heard it suggested that there is the slightest obligation of secrecy as to what passes in chambers. Everything which there transpires is and always has been spoken of with precisely the same freedom as that which passes in Court. Yet, as the judge acknowledges, the phrases "in camera" and "in chambers" are synonymous. We start, therefore, from the datum line that

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the judgment which we are asked to declare unappealable is confessedly based on reasoning which makes the whole lives of those who are professionally engaged in litigation one long series of criminal contempts of Court.

The first and to my mind the all-sufficient reason for giving to the order the plain meaning of the words used is that the interpretation which is suggested on behalf of the respondent would make it an order which would be ultra vires of any judge or of any Court. Civil Courts exist solely to enforce the rights or redress the wrongs of those who appeal to them and for no other purpose. They have ample powers for so doing. They summon the defendant to come before them, they give both parties assistance in obtaining the necessary evidence, they hear the rival contentions, and finally they decree the appropriate relief if any. But they can do no more except that when called upon to do so they enforce the relief that they have granted. Beyond and besides this the Court acquires no power or jurisdiction over an individual by reason of his having become a litigant. He remains in all other respects as free and as independent of interference from the Court as he was before the suit was instituted or as any other member of the public is who has never been a litigant.

The suggested interpretation of the order is in direct violation of all this. Take for example the case of a suit for separation based upon grave moral charges, or (as in this case) a suit for nullity of marriage, where the defendant has been successful. He was brought into the suit by no act of his own, but by the summons of the Court. He has been present at the hearing not by bargain with the judge, but of right. And now it has been declared that the charges were unfounded. In virtue of what authority can the judge control the future actions of that man and say that he shall never speak of that which has passed at the hearing, including of course the oral judgment pronounced by the judge? How has that defendant surrendered or forfeited any part of his personal freedom of action? He is sui juris and remains so, and the fact of his having been compelled to be a litigant cannot put him for all time in the position of being in statu pupillari to the judge before whom

the cause has come, so that such judge can impose upon him his personal views as to propriety or duty. I say "propriety or duty" advisedly, because in my opinion it is often not merely a solace but a duty which a man owes to himself and to those about him to inform them fully of all that has passed in these inexpressibly painful cases. It may be vital to him to clear away misconception in the minds of those who are dear to him or whose good opinion he values, and to obtain from them the sympathy and support that he needs. And I own that, not only as an individual but as a member of the Judicial Bench, I rebel against the suggestion that according to English law he may do this only so far as it may accord with the notions of some judge who, as such, has no more authority to act towards him as a moral director in his behaviour in life after the suit is over than has the man in the street.

I have taken the case of a defendant who is dismissed from the suit. But the argument is equally strong in the case of the petitioner. She comes before the Court as of right to obtain its aid in enforcing her rights. In accepting that aid she no more relinquishes her personal freedom of action than does the defendant in entering an appearance. The Court can impose no terms as a condition of its rendering its aid to parties in the enforcement of their claims. They have the right to demand that aid of the Court and it is there to give it without conditions. The same considerations apply to a defendant who is unsuccessful. The Court has the right and the duty to decree the proper relief against him, but it can do no more. It cannot add to that relief directions or commands as to his future conduct. If they are not part of the relief itself they are pronounced without authority. The conception of the Court interfering with litigants otherwise than by granting the relief which it is empowered and bound to grant is wholly vicious and strikes at the foundation of the status and duties of judges. We claim and obtain obedience and respect for our office because we are nothing other than the appointed agents for enforcing upon each individual the performance of his obligations. That obedience and that respect must cease if, disregarding the difference between legislative and judicial functions, we attempt

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ourselves to create obligations and impose them on individuals who refuse to accept them and who have done nothing to render those obligations binding upon them against their will.

It is this which makes me take so serious a view of the present appeal. The Courts are the guardians of the liberties of the public and should be the bulwark against all encroachments on those liberties from whatsoever side they may come. It is their duty therefore to be vigilant. But they must be doubly vigilant against encroachments by the Courts themselves. In that case it is their own actions which they must bring into judgment and it is against themselves that they must protect the public. The magnitude of the danger is illustrated by the present case. The serious encroachment on personal liberty which is here proposed is not supported by a single decision. There is on record no case where the Courts have asserted a right to control the personal acts of litigants after the conclusion of the suit except to enforce the relief granted. Yet without the support of any precedent the learned judge has in this case arrogated to judges the power to do so and we are asked to support him. The nature of the encroachment emphasizes the warning. Most people feel that the unrestricted publication in newspapers of what passes at the hearing of certain types of cases is a great evil, and many proposals have been made for regulating it. But all agree that this must be done by the Legislature. The judges are not the tribunal to decide on the proper limitations of public rights. The order in the present case is an attempt to assert for judges indefinitely wide powers in this respect. Not even the strongest partisan of legislative action has ventured to propose that private communications between individuals as to that which passes at the hearing of a suit should be interfered with. This order proceeds on the basis that a judge can of his own initiative absolutely forbid them. I have here to discuss the legal justification for such a doctrine and not its expediency, but I cannot forbear adding that in my opinion nothing would be more detrimental to the administration of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy.

A second conclusive proof that the order cannot bear the interpretation contended for by the respondent is derived from an examination of the origin of such orders and the jurisdiction under which they are made. The result of such an examination is in my opinion to establish beyond doubt that the order that the case should be heard in camera has always been intended to relate and has in fact related to the mode of conducting the hearing and to nothing more.

The jurisdiction which is exercised when an order is made to hear a matrimonial suit in camera is a jurisdiction the nature and origin of which are to my mind free from doubt. The Judicature Act, 1873, transferred to the Probate Division of the Supreme Court all the powers previously possessed by the Court for Divorce and Matrimonial Causes. That Court was established by the Matrimonial Causes Act, 1857, and by the provisions of that Act it took the place of the old Ecclesiastical Courts with regard to all matrimonial causes over which those Courts had had cognizance, and in addition was given jurisdiction to grant decrees of dissolution of marriage, a power never possessed by the Ecclesiastical Courts.

By s. 22 of that Act it is provided: "In all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." Very shortly after the passage of the Act the effect of these provisions on the power of the Court to hear cases in camera came up for decision. The case of *Barnett* v. *Barnett* (1) was a petition by the wife for a judicial separation on the ground of cruelty. The defence was a denial of the acts alleged. The petitioner applied for an order that it should be heard in camera. Both sides agreed that the details of the case made it desirable that it should not be heard in public. The Judge Ordinary, though strongly sympathizing with the application, held that he had no power to make the

(1) (1859) 29 L. J. (P. & M.) 28.

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order. He was no doubt influenced, as he states in his judgment, by the fact that at his instance a clause specifically empowering the Court to hear suits with closed doors had been inserted in the Bill which had been brought forward by the Government in the preceding session, but had been struck out by the House of Commons. Two or three days after this decision the same question arose in the case of *H.* (*falsely called C.*) v. *C.* (1) This was a suit for nullity of marriage on grounds similar to those in the present case. The matter came before the Full Court, which consisted of Williams J., Bramwell B., and the Judge Ordinary. The Court unanimously supported the view which had been taken by the Judge Ordinary in *Barnett* v. *Barnett.* (2) Bramwell B. bases his conclusions on the ground that the Court being a new one it was clear that it was instituted with the ordinary incidents of other English Courts of justice, and that therefore its proceedings should be conducted in public. That this is a sound principle in the absence of special legislative provision to the contrary cannot be doubted.

From the date of this decision until July, 1864, all cases in the Divorce Court were accordingly heard in public, but at or about the latter date in some unreported case the attention of the Court appears to have been specifically drawn to the language of s. 22 quoted above, and the judge must have come to the conclusion that it preserved to the Court all the powers with regard to the hearing of causes that were possessed by the Ecclesiastical Courts, including the power to hear in camera. This appears from a note to the judgment in the case of *A.* v. *A.* (3) From that time the Court expressly acted on this principle, and it became a regular practice in suits for nullity of marriage to make orders that they should be heard in camera in accordance with the usage of the Ecclesiastical Courts. In the year 1869 it was clearly laid down in the case of *C.* v. *C.* (4) that this power, being derived from the Ecclesiastical Courts by the operation of s. 22 of the Act of 1857, did not extend to suits for divorce because the jurisdiction to grant divorce did not exist in the Ecclesiastical Courts, but was specifically created and vested in the Divorce Court by

(1) 29 L. J. (P. & M.) 29.
(2) 29 L. J. (P. & M.) 28.
(3) L. R. 3 P. & M. 230.
(4) L. R. 1 P. & M. 640.

the Act of 1857. It is therefore incontestable that for many years before the Judicature Acts came into force the present practice of making these orders in nullity of marriage suits as a matter of course was thoroughly established, and they were made under and in virtue of the old jurisdiction possessed by the Ecclesiastical Courts and transferred to the Divorce Court by s. 22 of the Act of 1857. No change has been made in the practice since the Divorce Court became a branch of the Supreme Court, and it has not been the subject of any judicial consideration or decision since that occurred. It is clear, therefore, that these orders are still made under the old jurisdiction (which is supposed still to exist in the Probate Division) and in continuance of the old practice, and we are thrown back upon the jurisdiction of the Ecclesiastical Courts in this respect. The judge makes such an order as was made in this case under and by virtue of the same authority so to do as those Courts possessed, and the order must have the same meaning and effect as such an order had when made by them.

The procedure before the old Ecclesiastical Courts was most peculiar. Even if there were no other considerations to guide us in the matter, the nature of that procedure was such as of itself to make it impossible to attribute to such an order any meaning or effect other than that the public should not be present at the hearing. Prior to 1854 there was no power to take evidence viva voce before the Court. It was all taken in the form of depositions before commissioners. Briefly stated the procedure was as follows. The petitioner gave in the names of his witnesses. They were examined in private by the commissioner in the absence of both parties. The matters on which they were to be examined were specified beforehand by the parties calling them, and the other litigant was permitted to deliver interrogatories for their examination which were also put to them by the commissioner in taking their depositions. When the depositions had been taken they were sealed up and lodged with the Court, neither party being allowed to see them. So soon as the petitioner's case was complete there came a procedure called "publication." On that occasion the petitioner demanded that the depositions should be opened, and if the respondent desired

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to call witnesses he had to protest against publication, alleging that he had witnesses whom he wished to call. He had then to give their names and the points on which they were to give evidence, and the same course of procedure was gone through as in the case of the witnesses for the petitioner. Until the depositions of the respondent's witnesses were complete and he in his turn applied for publication he was not entitled to see the depositions either of his own or the petitioner's witnesses. When both sides had thus completed their case the depositions of both sets of witnesses were "published" and all restrictions as to secrecy ceased.

The whole object of this elaborate procedure appears to have been to prevent any witness being under the temptation to alter his tale so as to support the testimony adduced on his own side or to contradict that adduced on the other. This is exemplified by the rule that if on the publication of the petitioner's evidence the proctor of the respondent could not swear that he was ignorant of what had been deposed to by the petitioner's witnesses, he was not allowed to call evidence and the depositions of the petitioner's witnesses were forthwith published. But in all this elaborate procedure there was no attempt to preserve ultimate secrecy. After publication, which took place before the application to appoint the day for the hearing, the depositions were in the hands of both sides, and they were free to make what use of them they chose. If any proof were needed that there was no obligation of secrecy as to the matters of the cause it would be supplied by the procedure in respect of swearing the proposed witnesses. After the oath was administered they were admonished not to reveal their evidence to any person "until publication," shewing clearly that no secrecy was intended after publication had taken place. And in this respect it must be remembered that this procedure was pursued alike in all cases whether dealing with matters testamentary or matters matrimonial, and in particular that in the latter class of cases no difference was made in this respect between suits for nullity of marriage, divorce a mensa et thoro, restitution of conjugal rights, &c. The procedure was common to all.

After the evidence was complete an application was made to

fix a time for the hearing. From what I have already stated it is obvious that the hearing consisted merely in the discussion of the evidence that had already been given and the arguments upon it. I have considerable doubt whether in earlier times there was any idea of publicity being essentially a feature of the hearing. In Conset's Practice of the Ecclesiastical Courts, published in the year 1708, p. 158, the practice as to the hearing is described as follows: "The cause being now concluded, and all things in readiness for sentence, it is requisite that, at the time of this conclusion, the proctors desire a time may be assigned to inform the judge as well in matter of fact as the law on both parts; but this day of information is to be on some day on which no Court is kept and in the chamber of the judge or advocates (in the consistory in some places) at these informations the proctors who are feed in the cause are wont also to be present that they may be ready to acquaint the advocates what acts have been done in the cause." This description certainly does not point to anything like the trial in public to which we are accustomed in the Courts of Common Law and in Chancery. But I have no doubt that frequently the public were present at the arguments, though not as a matter of right, for it is clear that the Court had the power to exclude them if it thought it advisable so to do. Naturally it would avail itself of these powers chiefly if not exclusively in cases where the facts were of a character which made it undesirable that the public should be present when they were being discussed in all the detail which might be necessary in the interest of the parties to the suit. This would probably be done in most cases with the consent or even by the request of the litigants.

It is quite evident that in old times no importance was attached to the question whether a hearing should be in camera or not, because no reference to it is to be found in books of practice. There is nothing to suggest that it required a formal order of the Court. On the contrary there are cases where it is evident that the Court at the hearing required the public to leave only while a particular part of the evidence was being dealt with. Thus in the earliest case that I can find in the reports where it appears that hearing in camera was applied to suits for

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nullity of marriage—an anonymous case (1)—the medical certificate was read in camera though the rest of the hearing was apparently in public. Probably the practice with regard to suits of nullity of marriage became more settled after this, though it never seems to have risen higher than being a customary procedure not mentioned in books of practice, but no doubt well known to the profession. And with regard to suits generally in these Courts I do not think that it is possible to formulate any general rule as to when the public were excluded, except that it was done whenever the Court thought it was proper to do it.

It is natural that under these circumstances the power of hearing in camera should have been frequently exercised in the case of suits for nullity of marriage on the ground of impotence. The nature of the evidence would in most cases lead both parties to be desirous that this procedure should be followed. But it is abundantly clear that the practice which grew up of hearing such cases in camera was not based on any special powers possessed by the Ecclesiastical Courts in respect of such cases, but merely on the fact that the nature of the case was such as would usually induce the Court to do it, and therefore it became recognized as a practice. In this connection I entirely accept the dictum of Jeune P. in *D.* v. *D.* (2): "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity, but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard any suits in private."

In such a procedure no doubt could possibly arise as to the meaning of an order that the hearing of the suit should be in camera. The hearing consisted solely of the arguments of counsel on written evidence taken and published previously to the hearing, that is to say, which both the parties and the witnesses were free to communicate to whomsoever they pleased. To attribute to the Courts an intention to impose perpetual silence as to the arguments used when there was no such

(1) (1821) 2 Hagg. Cons. 332.

(2) [1903] P. 144, 148.

obligation with regard to the evidence and facts upon which those arguments were based would be absurd. But although these considerations appear to me to establish that the order only related to the presence of the public at the hearing and did not bear the interpretation now sought to be put upon it, the importance of the point is such that I have felt myself bound to examine into the material afforded by the reports of cases heard in the Ecclesiastical Courts and the text-books relating to the practice in those Courts to see whether there is any trace of any such interpretation having been at any time attributed to it. I can find none. There is nowhere the slightest suggestion or trace of any attempt on the part of the Court to enforce secrecy either on the parties to the suit or on anybody else as to the matters discussed at the hearing. On the contrary it is abundantly evident that neither in the judgments of the judges nor in the reports published by the various reporters is there any difference whatever in the treatment of cases tried in camera and of those which were not so tried. So marked is this that it is impossible to ascertain merely from the fulness with which the facts are reported or set out in the judgments or reports whether or not the cases were in fact heard in camera. Take for example the case of *Deane* v. *Aveling* (1), which was a suit for nullity of marriage on the grounds of impotence. The reporter, after saying that it was heard in camera, goes on to say, " As this is in every respect a singular case the evidence of the medical witnesses is given entire," and accordingly the whole of the evidence is set out in full. There is a like openness in reporting the evidence in the cases of *N——r falsely called M——e* v. *M——e* (2), *M. falsely called H.* v. *H.* (3), *S. falsely called E.* v. *E.* (4), *M. falsely called B.* v. *B.* (5), and *B——n* v. *M——e.* (6) It must be remembered that the authors of these reports published them as private undertakings, and had no greater or different rights with respect to disclosure than any other members of the public. Yet it is clear that they felt themselves free to report the facts of these cases just as fully as the facts of any other cases. Indeed

(1) (1845) 1 Rob. E. 279.
(2) (1853) 2 Rob. E. 625.
(3) (1864) 3 Sw. & Tr. 517.
(4) (1863) 3 Sw. & Tr. 240.
(5) (1864) 3 Sw. & Tr. 550.
(6) (1853) 2 Rob. E. 580.

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it is only of later years that they made any attempt to conceal the identity of the parties by reporting the cases under mere initials. In the earlier cases the names were given in full in the original reports or under so slight a concealment that they were ordinarily quoted and referred to in the digests, &c., by the full names. It is impossible to believe that while contemporary reporters enjoyed this full liberty of recounting the evidence in the case the parties interested were bound to inviolable secrecy, and the only conclusion to which one can come is that the order that the hearing should be in camera was recognized as relating only to the mode of conducting the hearing and had no reference to subsequent publication.

In the above I have treated as correct the decisions of the various judges of the Divorce Court and Probate Division to the effect that s. 22 of the Act of 1857 gives to the Court the power to hear in camera any suit other than one for divorce, and I have no wish to base my judgment on any other hypothesis. But in none of these cases was the attention of the Court called to s. 46 of the Act, which is an express enactment that witnesses in all proceedings before the Court "shall be sworn and examined orally in open Court." I entirely fail to see how this is reconcilable with the power to order that the hearing shall be in camera if that hearing includes the taking of evidence, as it is admitted to do in the present case. I see no reason why we should hesitate to give to this section its plain and ordinary meaning, and this would make the original order bad on the face of it. It is not difficult to imagine reasons why the Legislature should insist that there should be full publicity in the hearing of matrimonial causes where it is possible that both parties might desire that the suit should be successful whether based upon adequate grounds or not provided that the matter could be kept sufficiently private.

On the argument of this case before the Full Court a contention was put forward by counsel for the respondent that all branches of the Supreme Court have jurisdiction to hear cases in camera if they think fit so to do. Such a contention is against the weight of authority and is to my mind a most dangerous one. The decision of Bramwell B. in the case of *H.* (*falsely called C.*)

v. *C.* (1) above referred to shews that he considered that the Courts had no such powers, and in such a matter it would be hard to find a judge whose opinion is entitled to greater weight. In 1876 Sir George Jessel in the case of *Nagle-Gillman* v. *Christopher* (2) laid down that the Court had no power to hear cases in private even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action (as was suggested in *Andrew* v. *Raeburn* (3)), or in those cases where the practice of the old Ecclesiastical Courts in this respect is continued. The cases to which he refers where a public trial would defeat the object of the action are cases in which the relief sought is to prevent the defendant from using or communicating a secret process or confidential information, or, in other words, cases where secrecy on his part is in substance part of the relief sought. In such a case the Court will not permit justice to be defeated by its own forms of procedure. No doubt in very exceptional cases, such as *D.* v. *D.* (4), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. But that is not because he thinks upon general grounds that it would be better that the public should not be present, but because he cannot effectively try the case if they are there. This is made clear by the language of the judgment in that case, which does not support the contention that the Court has a general power to hear cases in camera. The only case which does not come within one of the classes enumerated by Sir George Jessel in which any such order was made was a case relating to Sherborne School, where Denman J., at the request of the parties, commenced to hear the case at nisi prius with closed doors. The action of the judge in so doing was directly in conflict with the decided cases and received severe criticism at the time. It was abandoned by him in the course of the hearing in deference to the opinion of his brother judges, and it has never, so far as I can ascertain, been followed in any reported case or received the approval of any Court.

But it is not necessary to examine this contention further.

(1) 29 L. J. (P. & M.) 29.
(2) 4 Ch. D. 173.
(3) L. R. 9 Ch. 522.
(4) [1903] P. 144.

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The order in the present case was not made by the judge and was not based on any consideration of the facts of the case. It was made in chambers by the registrar as a matter of course in following the old practice of the Ecclesiastical Courts and not otherwise. There is therefore no pretence for saying that it was or purported to be an exercise of any such inherent power in the Court depending on the special facts of the case. In the present case the facts were so simple and so devoid of any objectionable character that had the order depended on the facts of the particular case no judge would have said that it could not be tried in public. But however it was made, the meaning of the order must be the same, and, as I have pointed out, although the practice of making such orders in the Ecclesiastical Courts reaches back for so many years, there is no trace either in reports or books of practice of any suggestion that it affected anything but the mode of conducting the hearing.

On the grounds therefore of principle, of precedent, and of legal history I am of opinion that the attempt to give to an order that a cause shall be heard in camera any interpretation other than that which its words naturally bear entirely fails. Under such an order the public are excluded from the hearing, as was done in this case, and the order is then entirely complied with and is exhausted. In the cases in which the Court can make such an order it is nothing more than an extreme exercise of its power to control its own proceedings, and it does it because the matters require to be discussed without the presence of the public. But the Court has nothing to do with the action of the individual parties when the suit is over. It has never attempted to interfere with them and ought to fail if it seeks to do so. In those matters the parties are amenable only to the general law, which I am satisfied will never attempt to interfere with private communications between individuals which neither amount to nor bring about wanton and broadcast publication.

But apart from the consideration that the act complained of is no breach of the original order properly construed, I can see nothing in that order which distinguishes it from other orders made in civil suits or exempts it from the rule that an

attachment for disobedience to such an order is appealable. The order was made upon summons taken out by one of the parties and (assuming that the Court had jurisdiction to make it) it was, neither more nor less than any other order of the Court, an order which the parties to whom it applied were bound to obey. But there is no ground either in principle or otherwise why disobedience to such an order should be more or less a criminal act than, say, disobedience to an injunction. If a party be accused of disobedience to an order in a civil suit, he has the right to take the opinion of the superior Courts as to the true meaning of the order, the fact of the breach, and (if he was not a party to the making of the order) to the validity of that order and the jurisdiction of the Court to make it. Why should not the same be the case here? The order provided for other things than the hearing in camera, yet no one would suggest that disobedience to it in those respects was a criminal act. The object of s. 47 of the Judicature Act, 1873, was not to make a distinction between different classes of orders made in a civil suit or between one part of such an order and another. Its language plainly shews that its whole object was to shut off from appeal those judgments only which dealt with acts which are criminal by the common or statute law of the land.

It remains to deal with two or three cases which were relied upon by the respondent. The case of *Seaman* v. *Burley* (1) has no application. It deals only with the question whether an act punishable by a penalty under a statute is a criminal matter. The other two cases which require mention are *In re Freston* (2) and *Seldon* v. *Wilde*. (3) In the former of these two cases a solicitor claimed to be privileged from arrest for contempt of Court while attending at a police court to defend a prisoner. The Court of Appeal held that he was not so privileged. This case has no bearing on the interpretation of s. 47 of the Judicature Act, 1873, or on the right of appeal. Lord Esher treated the misbehaviour of the solicitor in that case as a breach of the law and decided the case on that ground. Lindley L.J. says in his judgment that there is no privilege

(1) [1896] 2 Q. B. 344. (2) 11 Q. B. D. 545.
(3) [1911] 1 K. B. 701.

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from arrest in cases of wilful contempt, such as disobedience to injunctions, and Fry L.J. substantially agrees with him. It is incontestable, however, that in such cases an appeal lies. Neither of the Lords Justices even uses the word "criminal" in their judgments. In the case of *Seldon* v. *Wilde* (1) an order had been made that the defendant, a solicitor, should pay the costs of a motion for attachment for contempt of Court in not having delivered to the plaintiff a bill of costs pursuant to an order for taxation of costs. The plaintiff sued the defendant to recover the taxed costs of the motion. The Court held that the action would lie because the order was not made in a criminal or quasi-criminal matter. I entirely fail to see the relevance of the decision. If a Court chooses to consider that such orders against a solicitor are "criminal or quasi-criminal" it may do so, but that does not affect the interpretation of s. 47. But it is important to notice that Buckley L.J. points out in his judgment that the question in the case of *In re Freston* (2) was not whether the proceedings were criminal but whether they were purely civil.

I am therefore of opinion on the above grounds that the order for committing the appellants for contempt of Court is not an order in a criminal cause or matter, and that the Court is bound to hear the appeal. Incidentally this decision carries with it the decision on the appeal itself. The acts alleged are not breaches of the order and are not criminal, and this is apparent upon the face of the summons to commit. Since these acts are not criminal by the law of the land the decision of the learned judge in the Court below cannot make them so. The proceedings for contempt have therefore been misconceived from the beginning, and the only proper order which the Court could make upon the appeal is, therefore, that it should be allowed.

FARWELL L.J. This case raises three questions of principle independently of the particular facts of the case. 1. Has the High Court in civil actions jurisdiction to order the trial of any action or the hearing of any application in camera? 2. What is the meaning and effect of an order for trial or hearing in

(1) [1911] 1 K. B. 701. (2) 11 Q. B. D. 545.

camera if any such can be made ? 3. Is there any appeal from an order to commit for contempt for breach of such an order ?

As to the facts of the particular case it is sufficient to say that it was the wife's petition on the ground of impotency and that on the order for medical examination of the parties the order to try in camera was made as a matter of course without objection. On the first question, however, this is really immaterial, for since the Judicature Act of 1873, s. 3, there is no difference between the several Divisions of the High Court in point of jurisdiction—*Pinney* v. *Hunt* (1)—and any special jurisdiction attached to any one of the Courts now combined into and forming the High Court can be exercised by any Division of the High Court. No order for committal has in fact been made in this case, but the appellants appeal from the order against them to pay the costs of the application to commit.

1. Now the primary function of the Court is to administer equal justice to all suitors in open Court. It is well said in Hallam's Constitutional History, 2nd ed., vol. 1, p. 312, that the first of the two direct guarantees of civil liberty in the country is "the open administration of justice according to known laws truly interpreted and fair constructions of evidence." But the paramount object is to do justice. The Court has undoubtedly inherent jurisdiction to prevent the abuse of its procedure: *Reichel* v. *Magrath* (2); and in like manner it has inherent jurisdiction to hear and decide in camera if it be necessary for the due attainment of justice.

It is a jurisdiction to be exercised with the greatest caution and only in special cases, and orders made in exercise of it are subject to appeal, for the open and public hearing and determination of suitors' rights and complaints is the salt of the Constitution ; but on principle and on authority I think it clear that the jurisdiction exists—*The King* v. *Clement* (3)—and is enforceable by attachment for contempt, and the discretionary exercise of such jurisdiction cannot be limited to precedents of cases that have already occurred, but "may be extended to new cases as they arise provided they be within the principle of those in which the

(1) (1877) 6 Ch. D. 98. (2) (1889) 14 App. Cas. 665.
(3) 4 B. & Ald. 218.

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power has been decided to exist": *Miller* v. *Knox*. (1) Lord Cairns and James and Mellish L.JJ. in *Andrew* v. *Raeburn* (2) recognized its existence in the old Court of Chancery, but doubted as to the practice of the Court, i.e., whether the jurisdiction ought to be exercised in a particular case when it had never been so exercised before, namely, when publicity would destroy the whole object of the action, and it was subsequently held by the Court of Appeal in *Mellor* v. *Thompson* (3) that this is a sufficient ground for ordering a trial in camera, and such an order was then made for the first time. I doubt if Jessel M.R. is correctly reported in *Nagle-Gillman* v. *Christopher* (4); his judgment does not purport to be given verbatim. I have no doubt that he meant that it was not in accordance with the practice of the Court, not that the Court had no jurisdiction, to hear cases in private except in the instances specified by him.

The exercise of the jurisdiction in the case of wards of Court doubtless originated in the extreme solicitude with which the person and property of a ward have always been guarded by the Court acting on behalf of the Crown as parens patriæ and extending parental care to the wards, but the jurisdiction is not confined to the wards or persons who may be considered as parties to proceedings in which the wards are interested, but extends to all persons in any way connected with the wards or their affairs, e.g., a suitor desiring to marry a ward or an editor publishing details of the ward's affairs that have been heard in camera.

In cases in the Divorce Division I adopt the judgment of Jeune P. in *D.* v. *D.* (5) (reading "secret process" for "patent" at p. 149). It is not so much the scandal to the public as the practical impossibility of eliciting evidence in many cases of nullity or divorce from modest women, under the eyes and in the hearing of a crowded Court of prurient sensation seekers, and with the knowledge that some of the baser newspapers may publish her evidence. "If justice cannot properly be done by hearing a suit in public, the Court is justified

(1) (1838) 4 Bing. N. C. 574, 589.
(2) L. R. 9 Ch. 522.
(3) (1885) 31 Ch. D. 55.
(4) 4 Ch. D. 174.
(5) [1903] P. 144.

and has power to hear it in camera." (1) I cannot read the section in the Divorce Act which requires that the witnesses shall be heard in open Court as intended to deny the parties justice in such a case. Secret process is another illustration—on a different ground—namely, that the very object of the action is defeated if publication is allowed. It is not necessary that the plaintiff should sue to restrain publication. It may be that both plaintiff and defendant are equally desirous of keeping the secret of a process, e.g., invented by the plaintiff and wrongfully acquired by the defendant while in the plaintiff's employment. Each party wishes to keep the secret, for each wishes to use it for his own benefit to the exclusion of the public. In such a case the plaintiff could not bring his action at all without destroying his secret, unless the Court could order the trial to be in camera. The principle is not novel: it was enunciated by Lord Eldon in *Cockburn* v. *Thompson* (2) as the reason for departing from the rule that all parties must be before the Court when it was impossible to bring them all there "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." I therefore answer the first question in the affirmative.

2. I am of opinion that an order to try in camera forbids the publication at any time without the leave of the judge of every detail that has passed in camera except the result. The phrase is of some antiquity and is found in Jacob's Law Dictionary, 1732. It has recently found its way into an Act of Parliament (Incest Act, 1908, s. 5), and s. 17 of the Married Women's Property Act, 1882, provides for hearing in private without using the phrase in camera. It has long been familiar in ward cases in Chancery. I entirely agree with North J. in *In re Martindale* (3) that the publication without leave of any detail except the result, whether before or after the ward has attained twenty-one, is a contempt of Court, and I have no doubt that in all other cases the order precludes the publication of any detail after judgment as well as during the trial, just as contempt of Court may be committed by publication of scandalous matter respecting the Court after

(1) [1903] P. 148. (2) (1809) 16 Ves. 321, 329.
(3) [1894] 3 Ch. 200, 201.

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adjudication as well as pending the trial: *McLeod* v. *St. Aubyn*. (1) There is no real hardship or absurdity in this, as was suggested by counsel; it has been common practice in Chancery for many years to apply to the judge for leave to publish certain particulars of hearings in camera in ward cases of public interest and not injurious to the ward, and these would of course be granted in proper cases, and, if refused, an appeal would lie from such refusal. There have been many appeals from orders in camera in ward cases, and no difficulty has ever arisen by reason of the order in preparing briefs or consulting counsel, even although the solicitors and counsel may both be newly brought into the case, and I decline to believe that there could be any difficulty in any other Division. It is impossible to provide in anticipation for all possible exceptions; it is far better and is the practice to make orders of this sort in general terms and leave the parties to apply, if and when particular circumstances arise, to be relieved from the exigency of the order. An instance of this is the appointment of a receiver in a puisne mortgagee's action to foreclose leaseholds. The receiver when in possession is there as the officer of the Court, and although neither the lessor nor the first mortgagee is deprived of his right, he cannot without contempt take possession, but obtains leave on application as a matter of course.

3. I am of opinion that this is a "criminal cause or matter" within s. 47 of the Judicature Act, 1873 (words which Lord Esher says should receive the widest possible interpretation and are used in the widest sense of the term: *Ex parte Alice Woodhall* (2)), and is not appealable. The case is governed by the principles laid down in *O'Shea* v. *O'Shea and Parnell* (3) establishing the distinction between orders of the Court made in aid of the litigants' rights and orders made to ensure the due administration of justice by the Court for its own assistance and protection. As regards the solicitor, who is an officer of the Court, the case is in my opinion clear: Hawkins' Pleas of the Crown, 8th ed.,

(1) [1899] A. C. 549. (2) 20 Q. B. D. 832, 835.
(3) 15 P. D. 59.

vol. 2, pp. 206—223; and as to the petitioner the order to try in camera is not made to enforce the rights of either party against the other, but to ensure the due course of justice: it is not made against either party for the benefit of the other, but upon both in the public interest: neither can waive it without the leave of the Court, and either can apply to the Court if it is broken. Contrast this with an action brought and an injunction obtained, e.g., to restrain the publication of a libel: the successful plaintiff can waive his injunction for good consideration or otherwise, and he alone can enforce it: it is his means of protecting his reputation or property, but it is absurd to suppose that the defendant could come to enforce the injunction against himself. The order for trial in camera is the Court's order for its own assistance and protection in the administration of justice, and it has the power to enforce it by committal for contempt which is inherent in all Courts of record: *Miller* v. *Knox* (1); *Rex* v. *Almon* (2); Blackstone's Commentaries, bk. iv., ch. 20, s. iii.; and such an order is no more appealable than an order to commit for creating an uproar in Court so as to prevent the trial from proceeding, or for insulting the judge in open Court. Such orders are not made in the cause or matter, nor are they confined to the parties: they are made to enable the due administration of justice, the wilful obstruction of which is a "criminal matter" within s. 47 of the Judicature Act, 1873.

It was laid down by Mellish L.J. in *The Queen* v. *Fletcher* (3) that the intention of s. 47 was to leave the procedure in criminal cases substantially unaltered, and that there was no appeal in any criminal case except the old appeal by writ of error for error on the record. Committal for contempt of Court by wrongfully interfering with the course of justice before the act was clearly a criminal matter—*Ex parte Fernandez* (4)—and not appealable: in that case a witness refused to answer a question which he was ordered to answer by the judge and was committed, and it was held by Erle C.J. and Willes and Byles JJ. that the contempt was a criminal act and that there was no appeal. The

(1) 4 Bing. N. C. 574.
(2) Wilmot's Opinions, 243, 254.
(3) 2 Q. B. D. 43, 44.
(4) (1861) 10 C. B. (N.S.) 3.

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order was made on the spot in Court without any indictment or further proceeding. The Lord Chief Justice says at p. 330 that it is "well established that a superior Court may adjudicate that a contempt of its powers has been committed, and may commit for that contempt without stating the facts." Byles J. says at p. 340: "The power of commitment for contempt is indispensable to the administration of justice, and it is the knowledge that it is indispensable which renders its exercise almost always unnecessary, and therefore exceedingly rare." I would also refer to Willes J.'s judgment, which is too long to quote at length. (1) Here there was no committal and therefore no warrant. It follows therefore from the judgment of this Court in *The Queen* v. *Fletcher* (2) that an order such as the present is a criminal matter and not appealable. (3) I am therefore of opinion that this appeal fails and should be dismissed with costs.

BUCKLEY L.J. This was a wife's suit against the husband for a decree of nullity of marriage. On February 14, 1911, the usual order for the appointment of medical inspectors was made, followed by the usual order that the cause be heard in camera. On June 13 the cause was heard in camera and a decree nisi granted for nullity. Subsequently the appellants before us, namely, the wife and Mr. Braby, her solicitor, obtained typewritten copies of the evidence given at the hearing of the suit in camera, and each of them took part in sending the same to certain persons. On November 23, 1911, the husband, the respondent in the suit, moved to commit them for contempt in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings, and on December 4, 1911, the judge found the contempt established and ordered the petitioner and her solicitor to pay the costs of the application. From that order this appeal is brought. A preliminary objection is taken that the appeal is one in a criminal cause or matter and that no appeal lies. In my opinion the preliminary objection succeeds.

There are two sets of facts upon which I say nothing. They

(1) 30 L. J. (C.P.) 328, 340, 341.
(2) 2 Q. B. D. 44.
(3) Per Willes J., 30 L. J. (C.P.) 328—340.

are, first, the facts as to what passed at the trial. The Court is upholding an order which required privacy for those proceedings. Unless it were necessary for the purposes of justice (which it is not) the Court would stultify itself if it stated that which ex concessis is to be kept private. The second are the facts upon which Bargrave Deane J. made his order. We are considering a preliminary objection that no appeal lies. For that purpose the facts which go to merits on the appeal if entertained are irrelevant. Moreover we have not heard counsel upon them and it would be improper to express any opinion upon them.

An order for hearing in camera of a suit such as this is not an order to enforce any civil right arising as between the parties. It is an order which the Court thinks proper to make for two reasons, first, that the parties may not be deterred from coming forward to seek relief and giving their evidence in the matter (a consideration which proceeds upon the necessity of ensuring the proper administration of justice); and, secondly, that upon grounds of morality and public decency a public hearing, resulting in a publication of details such as are relevant in such a suit, shall be excluded. Prima facie every cause in a Court of justice ought to be heard in public. An order to hear in private is in such a case as the present made upon public grounds and for the purposes of justice. Even if the parties consented to a hearing in public the Court might and would make the order for hearing in camera. The order in short is not an order in aid of any civil right of the parties, but an order of the Court the breach of which is an offence not inter partes, but against the order of the Court in a matter affecting the administration of justice. This is a criminal offence. The matter was considered in *O'Shea* v. *O'Shea and Parnell* (1), where the contempt consisted in the publication of comments calculated to prejudice the fair trial of the action. The contempt in the present case is I think similar to a contempt of that description. The act done is not in breach of some right arising inter partes with the result that the party committed would upon obeying the order be entitled to be discharged, but is punitive with the result that the party committed cannot upon purging his contempt say that he is entitled

(1) 15 P. D. 59.

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to his discharge, but must remain in custody until the Court considers that he has been adequately punished. This contempt is not merely a contempt of a criminal nature as in *In re Freston* (1), much less a contempt such as in *Seldon* v. *Wilde* (2), but is a criminal offence in that it is a contempt of Court in breach of an order of the Court made in enforcement of that which the Court holds to be an obligation arising not inter partes, but towards the Court before which the proceedings are brought.

It is not every publication of proceedings heard in camera which will be a contempt. A communication of the whole of the proceedings with every detail to those who professionally act for either party upon an appeal would of course be no contempt. A communication to other persons and for proper purposes may well be no contempt. A communication, for instance, made by a young wife to her mother of that which has taken place might well be no offence at all. But the question whether an offence has been committed is for the judge. Many of the considerations which have been pointed to in a judgment which has preceded my own would demand attention if it had been contended (as it has not) that the judge had no jurisdiction to make the order. There are further considerations which may well be entitled to weight before the judge whose duty it is to decide the matter. But they lend no assistance to the question whether his judgment is subject to review. In my judgment if the judge on whom it rests to determine the question arrives at the conclusion that an offence has been committed it is a criminal offence and no appeal lies. That is all we have to decide. For these reasons I think that the preliminary objection must be allowed and this appeal be dismissed with costs.

To prevent misconception I ought perhaps to add that there is in my judgment no resemblance for the present purpose between ordinary proceedings before a judge in chambers and a hearing which the judge has ordered to take place in camera.

KENNEDY L.J. agreed with the majority of the Court.

Appeal dismissed.

Solicitors: *Braby & Waller; William S. Jerome.*

(1) 11 Q. B. D. 545. (2) [1911] 1 K. B. 701.

H. C. R.

JONES *v.* JONES.

1912
Oct. 21.

Divorce—Practice—Wife's Costs—Husband's Petition—Answer making Counter-charges and claiming Relief—Order for Security for Wife's Costs—Non-compliance—Attachment.

In a petition by a husband praying for a judicial separation on the ground of cruelty, to which the wife filed an answer denying the cruelty, countercharging the husband with adultery, and praying for judicial separation, the husband had been ordered to pay or secure the wife's costs of the hearing as estimated by one of the registrars, but had failed to comply with this order:—

Held, that the wife's cross-claim for relief constituted her a petitioner and that it was open to her to move for a writ of attachment against her husband in respect of his failure to find security pursuant to the order.

Clarke v. *Clarke* [1891] P. 278, dissented from and not followed.

Motion for attachment.

The husband's petition, dated August 16, 1911, alleged cruelty and prayed for a judicial separation and the custody of two of the three children of the marriage.

The wife's answer, dated October 13, 1911, denied the allegations of cruelty, and, on January 18, 1912, the answer was amended by adding counter-charges of adultery and a prayer for a judicial separation and the custody of all three children.

On May 3, 1912, the petitioner was ordered to pay, within seven days after service, the sum of 28*l.* 18*s.*, being the amount of the respondent's costs, as taxed; and he was further ordered to pay, within the like period, the sum of 25*l.*, estimated by one of the registrars as sufficient to cover the costs of the respondent of and incidental to the hearing of the cause, or to give a bond under his hand and seal and of two sufficient sureties in the penal sum of 50*l.*, conditioned for the payment of such costs of the respondent as should be certified to be due and payable by the petitioner, not exceeding the said sum of 25*l.*, and that all further proceedings be stayed until this order should be complied with.

The 28*l.* 18*s.* was paid, after distress had been levied.

On October 5, 1912, notice of the present motion for attachment was given by the respondent's solicitors, by reason of the petitioner's non-compliance with the latter part of the order.

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The petitioner filed an affidavit in support of the motion, and on October 12, 1912, the respondent swore an affidavit in opposition, and, on the application of the respondent's counsel, the petitioner was ordered to attend in Court to be cross-examined.

Bayford, for the respondent.

Rooth, for the petitioner. The procedure is wrong. The remedy against a petitioner in such a case is to apply for the dismissal of the petition: *Clarke* v. *Clarke*. (1)

BARGRAVE DEANE J. I shall not follow that case. The decision was not right. In the case of a simple denial of the allegations in a petition, the right course for a respondent would be to apply for the dismissal of the petition, if the petitioner should fail to comply with an order for costs. But if the respondent, by her answer, puts cross-charges upon the record and claims relief, she, in fact, becomes a petitioner; and, as a petitioner, she may move for a writ of attachment if her costs are not secured pursuant to an order of this Court.

I am satisfied that this petitioner can comply with the order for security, and I therefore order that the writ of attachment do issue, but direct that it lie in the registry for ten days to give him an opportunity to comply with the order for costs. The respondent will have the costs of this motion.

Leave to appeal, on the undertaking of the petitioner's solicitor to bring into Court 30*l.*, *being* 25*l. as ordered and* 5*l. for costs of the motion for attachment.*

Solicitors for the wife (respondent): *Percy Robinson & Co.*
Solicitor for the husband (petitioner): *S. Yardley Tilley.*

(1) [1891] P. 278.

H. D. G.

THE TONGARIRO.

1912
March 26.

Admiralty—Ship—Pilotage—Exemption—"Navigating in ballast"—Coals as Stores—Order in Council, July 25, 1861.

A steam vessel of 7600 tons gross register, and 1538 tons water ballast capacity, left Newcastle-upon-Tyne for Port Chalmers, New Zealand, via London, having on board, in addition to 710 tons water ballast, 3040 tons of coal for her own use on the voyage. Whilst proceeding up the Thames she ran into and damaged a pier at Purfleet, and her owners, on being sued by the pier owners, set up compulsory pilotage as a defence:—

Held by Bargrave Deane J., that the vessel was exempt, as she was not carrying passengers, or freight earning cargo, the coals being "stores," and she was, therefore, "navigating in ballast" from a port or place in the United Kingdom to another port or place in the United Kingdom, within the meaning of the Trinity House by-law, approved by Order in Council of July 25, 1861.

Trial of an issue as to compulsory pilotage.

The plaintiffs were the British Petroleum Company, Limited.

The defendants were the New Zealand Shipping Company, Limited, owners of the steamship *Tongariro*.

On October 7, 1911, during a fog, the *Tongariro* ran into and damaged the plaintiffs' pier and jetty situate at Purfleet on the north side of Long Reach of the river Thames. On October 12, the plaintiffs commenced an action against the defendants claiming compensation, and by their statement of claim alleged that the damage was solely caused by the negligent navigation of the *Tongariro* by the defendants or their servants.

By their defence, the defendants pleaded, alternatively, that "if there was any negligence in the navigation of the *Tongariro*, which is denied, the same was solely that of the pilot who was in charge of her by compulsion of law."

By order, dated March 9, 1912, the preliminary question whether the pilot of the *Tongariro* was in charge by compulsion of law was set down for argument, the question turning on the meaning to be attached to the words "navigating in ballast" which occur in the Trinity House by-law, set out and approved by an Order in Council of July 25, 1861, the material portion of which is as follows:

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"Whereas the Trinity House of Deptford Strond, being a pilotage authority, hath submitted for the consent of Her Majesty in Council the following bye-law viz.:—

"'That all ships navigating in ballast from any port or place in the United Kingdom to any other port or place in the United Kingdom shall, when not carrying passengers, be exempt from compulsory pilotage within the pilotage jurisdiction of the said Trinity House.'

"Now, therefore, Her Majesty having taken the said bye-law into consideration . . . . is pleased to declare her consent to the same, and the said bye-law is hereby approved accordingly."

The *Tongariro* is a steel twin-screw steamship, belonging to Plymouth, of 7600 tons gross, and 4917 tons net, register. According to the evidence given at the trial of the issue as to pilotage before Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, she had been to Newcastle-upon-Tyne in water ballast for repairs, with 195 tons of coal in her bunkers, and a crew of runners from London to Newcastle and back. She left Newcastle on October 5 for Port Chalmers, New Zealand, via London, clearing at the Customs for London in ballast. She was proceeding up the river Thames, in charge of a duly licensed pilot, at the time the accident happened, and had on board 710 tons water ballast in tanks of which the capacity was 1538 tons. She had also 3040 tons of coal purchased at Newcastle for her own use on the voyage, thereby saving six shillings a ton on London prices. Of this coal 1095 tons were in the bunkers and the rest in the hold and 'tween decks. On October 20, having loaded her cargo in London, and shipped her passengers, she sailed for Port Chalmers with this coal on board, calling at Teneriffe and there taking in more bunker coal.

1912. March 26. *Laing, K.C.*, and *C. Robertson Dunlop*, for the defendants, the owners of the steamship *Tongariro*. By s. 622 of the Merchant Shipping Act, 1894, the *Tongariro* was under compulsory pilotage, for the only by-law, made under the provisions of this or earlier statutes, which can be cited in support of the contention that this vessel, at the time and place,

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was exempt, is that set out in the Order in Council of July 25, 1861; but that by-law can only reasonably be deemed to apply to ships bona fide navigating in ballast from one port to another port in the United Kingdom, that is to say, to ships in light draught, only carrying sufficient ballast for stability in a seaway whilst shifting from one port to another, without passengers, and not earning any freight. In this case, however, the vessel cannot be said to have been in ballast trim, as she had over 3000 tons of coal on board in addition to her water ballast.

[On the question of the power given to pilotage authorities to make exemptions, reference was made to ss. 581, 583, 603, 605, 625 (1.), (3.), and 745 (1.), (*a*), of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); on the question of the clearance of ships in ballast "not having any goods on board except stores," to s. 6 of the Customs and Inland Revenue Act, 1878 (41 Vict. c. 15); and, on the exemption from payment of light dues in the case of vessels "when navigated wholly and bona fide in ballast on which no freight is earned," to the Second Schedule of the Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), and to the Order in Council of November 21, 1855, in respect of the arrival inwards of ships from foreign parts at a port or place in the United Kingdom, and "navigating from thence in ballast" to a port or place in the United Kingdom. The case of *The Glanystwith* (1) (following *The Winestead* (2)) was also referred to.]

Bateson, K.C., and *Adair Roche*, for the plaintiffs, the British Petroleum Company, Limited. The *Tongariro* was navigating "in ballast" within the meaning of the by-law set out in the Order in Council of July 25, 1861, and, therefore, was exempt from compulsory pilotage, for the coals on board were not cargo, but "stores" for the ship's use, just as, in the case of a sailing ship, spare sails or a quantity of canvas, not yet made up, would be "stores" for the ship's use. In fact the vessel had not got more coals on board than her full bunker, and water ballast, capacity, and was not deep in the water. It cannot be said that if there is more ballast on board than required to make the vessel seaworthy that turns the excess ballast into cargo.

(1) [1899] P. 118. (2) [1895] P. 170.

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The facts in *The Winestead* (1) and in *The Glanystwith* (2) are not applicable to the present case, so that the exemptions under s. 625, sub-ss. 1 and 3, of the Merchant Shipping Act, 1894, might be invoked in favour of the *Tongariro* being free from compulsory pilotage if the case were not covered by the Order in Council above referred to.

BARGRAVE DEANE J. This is a short point, but an important one. It is whether a steamer, otherwise within the Order in Council of July 25, 1861, can be said to be "in ballast" when she is carrying more coal than is necessary to take her from one port to the other. That is what it really comes to.

I am of opinion that this vessel was in ballast within the meaning of the Order in Council and of the by-law passed by the Trinity House and recognized by that Order in Council. The by-law is as follows: "That all ships navigating in ballast from any port or place in the United Kingdom to any other port or place in the United Kingdom shall, when not carrying passengers, be exempt from compulsory pilotage within the pilotage jurisdiction of the said Trinity House." First of all, if her two bunkers had been full and her tanks had been full she would only have had some 3750 tons in her. She was, as a matter of fact, only down to three-eighths of her dead-weight capacity—3750 tons as against 10,000. She had nothing on board which was earning freight. She was on a voyage from Newcastle to Port Chalmers via London, which would require her to be cleared in London, which would again be a protection against any possibility of fraud upon the Government.

There does not appear to be any definition in the Merchant Shipping Act of what is "in ballast," and all counsel for the defendants have been able to do is to quote to me two statutes upon other subjects in which there are definitions of "in ballast" which are contradictory of each other; and therefore it is clear that "in ballast" must have a different meaning according to the different circumstances to which it is sought to apply it.

I now come to another point which seems to me conclusive. Under what head would you class bunker coals on board a ship?

(1) [1895] P. 170. (2) [1899] P. 118.

Surely they are stores. If they are stores, then you have got the definite word "stores" in the language of the provisions which have been cited. The clearance says this: "That she has not on board, nor will she take on board at this port, any goods, wares, or merchandise whatever, except such stores as are necessary for the use of the said ship during the said voyage"—the said voyage being described as to Port Chalmers. She did not take on board more stores than were necessary for her purpose on that voyage, because we have it in evidence that she would have required more than the 3040 tons on board to take her all the way to Port Chalmers, and that she would have to take on some hundreds of tons of coal at Teneriffe.

I am of opinion that these coals taken on board at this time were stores within the meaning of the clearance; that they were not goods or merchandise in the sense that they were earning freight; that they were nothing which would bring this vessel within the provisions of any regulation which would recognize that she was carrying them as cargo. Vessels are either in ballast or laden—I agree with counsel for the plaintiffs about that—and if you had seen this vessel in the Thames, only down to three-eighths of her loading draught, you would have said at once that she was in ballast. That, however, is not all that is necessary. It is only in point to the extent that she was light. The whole point is that when a vessel has got nothing on board except these matters which are necessary for her purposes as a travelling vessel, can she be said to be otherwise than in ballast?

There is one other matter to which I wish to refer. It is this. A steamer requires coal for her propulsion at present—she may require oil later on—but a sailing vessel requires canvas. Now, if a sailing vessel has two or three duplicate sets of sails beyond any amount of not-made-up canvas on board, is that to be said to be other than stores? They are just as much stores in the one case as in the other, and in my opinion if you look at this case from any point of view it cannot be said that this steamer was carrying cargo. If she was not carrying cargo she was in ballast. You cannot say a vessel shall only have so much ballast. There is no regulation prescribing, according to tonnage, how much

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ballast she shall have. She may be ballasted right down to her load line, I suppose, if she thinks right.

In my opinion in this case the extra coal the *Tongariro* was carrying, which was to be used entirely by herself and in her own furnaces, was nothing more or less than ballast. In my opinion the vessel was in ballast, and pilotage was not necessary, the vessel being exempt. There will be judgment for the plaintiffs on the issue raised as to pilotage, with costs.

Solicitors for plaintiffs, the British Petroleum Company, Limited: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Tongariro*: *Cattarns & Cattarns.*

T. L. M.

THE END.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1912, will be as follows:—

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—— *Constantinidi* v. *Constantinidi and Lance* [1904] P. 306. Distinguished. LORAINE *v.* LORAINE AND MURPHY - - **[1912] P. 222**

—— "*Dictator*," *The* - - [1892] P. 304 The principles laid down in the course of the judgment in, followed. THE "DUPLEIX" - - - **[1912] P. 8**

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—— "*Gemma*," *The* - - - [1899] P. 285
Referred to. THE "DUPLEIX"
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—— "*Hankow*," *The* - - (1879) 4 P. D. 197
Followed. THE "UMSINGA"
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—— *Loraine* v. *Loraine and Murphy* [1912] P. 86.
Reversed - - - [1912] P. 222

—— *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149.
Principle laid down in, followed. STATHAM *v.* STATHAM AND THE GAEKWAR OF BARODA - [1912] P. 92

—— "*Normandy*," *The* - [1904] P. 187
Followed. THE "UPCERNE"
[1912] P. 160

—— *Pretty v. Pretty* - - [1911] P. 83
Approved. BROOKE *v.* BROOKE
[1912] P. 136

—— *Roche* v. *Roche* - - [1905] P. 142
Disapproved. BROOKE *v.* BROOKE
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—— "*St. Paul*," *The* - - [1909] P. 43
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—— *Scott* v. *Scott* - - - [1912] P. 4
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—— "*Tactician*," *The* [1907] P. 244
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—— "*Umsinga*," *The* - - [1911] P. 234
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CONFLICT OF LAWS—*Foreign Subject—Administration—Succession to Property—Movables—English Document — Construction—Jurisdiction.*

An Englishwoman married an Italian and was left a widow and a domiciled Italian subject. She made no will, but signed a letter said to constitute a holograph will in Italian law, and died leaving personal property in England and in Italy. Her sisters issued a writ in the Probate Division as next of kin for a grant of letters of administration of her estate. Other persons, claiming under the holograph, then commenced proceedings in Italy and applied in the probate action for a stay of all the proceedings in that action. There was no dispute as to the Italian law. Upon appeal from an order staying the proceedings, the only question of substance in

CONFLICT OF LAWS—*continued.*
dispute was on the construction of the holograph letter :—
Held (reversing the order of Sir Samuel Evans, President), that the English Court had jurisdiction to make an administration order and therefore to decide any question with regard to the assets of the deceased ; and that the question, being only of construction of English words, ought to be decided in the English Courts.
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DIVORCE—*Co-respondent—International Law—Foreign Sovereign—Privilege—Proof of Status—Certificate of Secretary of State—Petition.*
A foreign ruling prince is not capable of being made a co-respondent in a suit for divorce in the High Court of Justice in England ; and, where such a prince had been named as a co-respondent in a petition, his name was, on proof of his status, ordered to be struck out.

DIVORCE—*continued.*
A certificate from the India Office was accepted as evidence of the status of the person in question, following the principle laid down in *Mighell* v. *Sultan of Johore* [1894] 1 Q. B. 149. STATHAM *v.* STATHAM AND THE GAEKWAR OF BARODA - - **Bargrave Deane J. 92**

————Costs (Wife's)—Order for security for—Non-compliance—Attachment.
See No. 8, below.

2. —— *Evidence—Practice—Plea of Cruelty—Cross-Charge of Adultery—Evidence of Petitioner — Cross-examination — Evidence Further Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.
Where, in a suit for a judicial separation brought by a wife on the ground of her husband's cruelty, two of the charges were that he made false accusations of adultery against her with a man named, with whom, in the answer, he charged her with adultery, and who was now cited as co-respondent in the husband's cross-petition, and the suits having been in due course consolidated, the wife, after giving evidence in support of her charges of cruelty, may be cross-examined as to the allegations of adultery in her husband's answer and cross-petition, although she has not, in examination-in-chief, been asked to deny the adultery. LEWIS *v.* LEWIS. LEWIS *v.* LEWIS AND NEILLY - - - **Bargrave Deane J. 19**

3. —— *Husband's Petition—Former Suit by Wife—Cruelty and Adultery proved—Condonation—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Discretion of the Court—Decree Nisi.*
The discretion conferred upon the Court by s. 31 of the Matrimonial Causes Act, 1857, is to be exercised according to the facts and circumstances of each particular case, and no strict rules ought to be laid down, fettering the discretion conferred upon the Court by that section.
Where a husband (respondent in previous proceedings) had been found guilty of cruelty and, after his wife had left him, of a single act of adultery, and these offences had been condoned by subsequent cohabitation, the Court granted the husband a decree nisi in a suit instituted by him on the ground of the wife's adultery. WOLTERECK *v.* WOLTERECK AND WALTERS - - **Samuel Evans, Pres. 201**
See also a further report of *Brooke* v. *Brooke* [1912] P. 136 (the King's Proctor shewing cause), as a note at pp. 205, 206, of the above case.

4. —— *Nullity of Marriage—Hearing in Camera—Decree Nisi—Publication—Contempt of Court—Committal—Appeal—Criminal Cause or Matter—Error of Law apparent upon the Record—Practice—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 19, 47.
The effect of an order that a case should be heard in camera is the same whether it is made in the Chancery Division or the Divorce Division, and the meaning of it is that the details of the hearing are not to be made public at any time

DIVORCE—*continued.*

without the leave of the Court, although the bare result may be published. The publication of the proceedings on a hearing in camera may be subject-matter of contempt, and may be punished as such. An order to hear a case in camera is made by the Court for its own assistance and protection in the administration of justice, not to affect the civil rights of the parties; and an order for committal for breach of such an order is a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, from which an appeal to the Court of Appeal will not lie.

On a motion by the respondent in a nullity suit to commit for contempt of Court the petitioner and her solicitor for publishing a copy of the transcript of the official shorthand writer's notes of the proceedings taken at the hearing of the cause, in contravention of an order directing that the cause should be heard in camera, Bargrave Deane J. accepted the apologies of the petitioner and her solicitor and made no order upon the motion to commit them to prison, but directed that the costs should be paid by them jointly and severally. They appealed, and when the appeal came on for hearing the preliminary objection was taken that the order was made in a criminal cause or matter, and that under ss. 19 and 47 of the Judicature Act, 1873, no appeal would lie:—

Held by the Full Court of Appeal (Cozens-Hardy M.R., Vaughan Williams, Fletcher Moulton, Farwell, Buckley, and Kennedy L.JJ., Vaughan Williams and Fletcher Moulton L.JJ. dissenting), that the Court had jurisdiction to make the order to hear in camera; that the order was made to assist the Court in the administration of justice, not to affect the civil rights of the parties; that the order to pay costs was a judgment in a criminal cause or matter; that there was no "error of law apparent upon the record"; and that the appeal would not lie.

Decision of Bargrave Deane J. [1912] P. 4, affirmed. SCOTT (OTHERWISE MORGAN) *v.* SCOTT - - - - - - **C. A. 241**

5. —— *Nullity of Marriage—Non-consummation—No Apparent Defect—Cross-Claims for Nullity—Finding of Incapacity quoad hanc et quoad hunc—Decree Nisi—Either Party at Liberty to apply for Decree Absolute.*

If the Court is satisfied that a marriage has not been, and that, as regards both the wife and the husband, it cannot be, consummated by the parties thereto, though no reason for non-consummation is manifest or apparent, it is warranted in annulling the marriage.

In such a case, the Court pronounced a decree nisi on the prayer of each of the parties, and either party was, by the terms of the decree nisi, to be at liberty to apply for the decree to be made absolute. G. *v.* G.

Bargrave Deane J. 173

6. —— *Nullity of Marriage—Non-Consummation—Parties never under the same Roof—Wilful and Wrongful Refusal of Cohabitation—Refusal to submit to Medical Inspection—Inference of some Impediment—Decree.*

Although the parties to a ceremony of marriage may have never since the date of the marriage lived under the same roof, it is competent to the Court, if satisfied of the bona fides of the suit, to infer—from the wilful and wrongful refusal of the one party (in this case the wife) to live with the other, coupled with the further refusal of the same party to submit to medical inspection—that there is some impediment to consummation, and to pronounce a decree nisi for nullity of marriage at the suit of the party wronged. W. *v.* W. (OTHERWISE L.)

Samuel Evans, Pres. 78

—— Nullity of marriage—Practice—Pleading—Claim for nullity in answer to petition for dissolution.
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7. —— *Practice — Pleading — Claim for Nullity in Answer to Petition for Dissolution.*

A prayer for a decree of nullity on the ground of impotence may be put forward by a respondent in answer to a petition for dissolution of marriage. S. *v.* S. AND R.

Bargrave Deane J. 16

8. —— *Practice—Wife's Costs—Husband's Petition—Answer making Counter-charges and claiming Relief—Order for Security for Wife's Costs—Non-compliance—Attachment.*

In a petition by a husband praying for a judicial separation on the ground of cruelty, to which the wife filed an answer denying the cruelty, countercharging the husband with adultery, and praying for judicial separation the husband had been ordered to pay or secure the wife's costs of the hearing as estimated by one of the registrars, but he failed to comply with this order:—

Held, that the wife's cross-claim for relief constituted her a petitioner and that it was open to her to move for a writ of attachment against her husband in respect of his failure to find security pursuant to the order. *Clarke* v. *Clarke* [1891] P. 278, dissented from and not followed. JONES *v.* JONES - - **Bargrave Deane J. 295**

9. —— *Settlement, Petition for, under the Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 45—*Wife's Interest under Will without Power of Anticipation—Second Marriage after Presentation of Petition — Jurisdiction — Lis Pendens—Forfeiture on Alienation of Interest—Effect of Order for Settlement—Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.

Upon a petition for a settlement under s. 45 of the Divorce Act, 1857, the Court has no jurisdiction, in a case where the wife has married again, to order a settlement by her of property to which she is entitled under the trusts of her father's will for her separate use without power of anticipation.

To order such a settlement would be in effect to vary the trusts of the will, which the Court has no power to do, either under s. 45 of the Matrimonial Causes Act, 1857, or under s. 5 of the Matrimonial Causes Act, 1859.

In such a case the presentation of a petition under s. 45 will not operate as a lis pendens so as to prevent the restraint upon anticipation

DIVORCE—*continued.*
from re-attaching upon the wife's subsequent marriage.

Semble, that an order for a settlement under s. 45 of an interest derived under an instrument containing a provision for forfeiture on alienation of, or on the commission by the donee of any act divesting, such interest would not work a forfeiture of the same.

Constantinidi v. *Constantinidi and Lance* [1904] P. 306, distinguished. Decision of the President, [1912] P. 86, reversed. LORAINE *v.* LORAINE AND MURPHY - - - **C. A. 222**

10. —— *Verdict, Judgment, and Decree—Motion by Co-respondent to set aside—Allegation of Fraud—Jurisdiction.*

The Court has no jurisdiction on motion by a co-respondent to rescind a decree absolute on the ground that the decree and the verdict and judgment upon which the decree was founded were obtained by fraud. KEMP-WELCH *v.* KEMP-WELCH - **Samuel Evans, Pres. 82**

11. *Wife's Petition—Decree Nisi—Intervention and Plea by King's Proctor—Material Facts—Withholding or Suppression—Petitioner's Answer to Plea—Fresh Allegations in regard to the Respondent—Powers and Practice of the Court.*

Even where it appears that material facts were deliberately withheld or wilfully suppressed at the hearing of a petition for dissolution of marriage, the Court must, upon an intervention by the King's Proctor, take into consideration all the facts proved in evidence under the King's Proctor's plea or the answer thereto filed by the petitioner before deciding whether the decree nisi should be rescinded; or whether the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, should be exercised in favour of the petitioner with a view to the decree being made absolute; or whether a middle course should be adopted with a view to further inquiry and elucidation of the facts.

The circumstances of each particular case must be dealt with as justice may require, regard being had, not merely to the parties themselves, and to others who may be interested in, or affected by, the decision of the Court, but to public decency and morality and the welfare and interests of society and the State.

The Court may, if thought fit, suspend its decision and may direct that notice of any fresh allegations, raised for the first time in the petitioner's answer to the King's Proctor's plea, shall be served upon the respondent.

Roche v. *Roche* (*The King's Proctor shewing Cause*) [1905] P. 142, disapproved.

Pretty v. *Pretty* (*The King's Proctor shewing Cause*) [1911] P. 83, approved. BROOKE (THE KING'S PROCTOR SHEWING CAUSE) - - - **Samuel Evans, Pres. 136**

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ECCLESIASTICAL LAW—*Faculty—Jurisdiction—Grant of Faculty for Erection on Consecrated Ground not used for Burials of Non-provided School where Religious Instruction will be given according to the Principles of the Church of England—Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 7, 23—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 5; *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 1 (*a*), (*b*), (*d*), *and sub-s.* 5—*Discretion—Substantial Ecclesiastical Purpose—Effective Control of Church Authorities over Religious Instruction—Practice—Appeal by Notice of Appeal.*

The Ecclesiastical Courts have jurisdiction in their discretion to grant faculties authorizing the erection on consecrated ground of the buildings of public elementary schools not provided by the local education authority in cases where it is proved that in the building so to be erected religious instruction will be given according to the principles of the Church of England and that interments have never taken place in the ground upon which it is proposed that the school buildings shall be erected.

Decision in *In re Bettison* (1874) L. R 4 A. & E. 294, followed. CORKE *v.* RAINGER AND HIGGS - **Arches Court of Canterbury 69**

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PROBATE—*Administration—Outstanding Grant—Administrator abroad—Property unadministered—Small Estate—Production of Outstanding Grant and Notice to Administrator dispensed with—Revocation of Grant—Fresh Grant de bonis non—Practice.*

Where an administrator of a small estate had gone to New Zealand, taking the grant with him, the Court, with the object of avoiding expense and delay in winding up the estate, revoked the grant and made a fresh grant de bonis non without notice to the administrator and without requiring production of the original grant. IN THE ESTATE OF THOMAS
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2. *Death—Motion for Presumption of Death—Uncertainty as to Date of Death—Form of Oath to lead Grant—Practice.*

The dead body of a lady who had disappeared on December 23, 1909, was found in a river on the 29th of the same month. Upon a motion for presumption of death, the Court made no order on the motion, intimating at the same time that, upon the applicant swearing that the deceased died on December 23 or 29, 1909, or on some day between those dates, a grant would be made in the Probate Registry. IN THE ESTATE OF LONG-SUTTON - **Samuel Evans, Pres. 97**

3. *Renunciation — Executor — Alternative Capacity—Creditor—Grant de bonis non (with Will annexed).*

A renunciation, in common form, by the sole executor under the will of a deceased testator, having been filed, a grant of administration, with the will annexed, was made to the testator's mother, the residuary legatee named in the will. She died, leaving part of the estate unadministered. The Court permitted the person who had been named as sole executor, and who had renounced, to take, in his capacity of creditor, letters of administration de bonis non, with the will annexed.

The enforcing of r. 50 of the Rules and Orders, 1862 (non-contentious business), is in the discretion of the Court. IN THE ESTATE OF TOSCANI - - - **Bargrave Deane J. 1**

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SCOTTISH LAW—*Marriage—"Irregular" Marriage in Scotland—Registration of Births, &c. (Scotland) Act*, 1854 (17 & 18 *Vict. c.* 80), *s.* 58—*Extract from Register Book of Marriages—Marriage Law (Scotland) Amendment Act*, 1856 (19 & 20 *Vict. c.* 96), *s.* 2—*Evidence—Divorce—Practice.*

A marriage in Scotland, by declaration in presence of two witnesses, duly registered pursuant to warrant of the sheriff-substitute, was allowed to be proved by the oral evidence of one of the parties to the marriage and by production of a document purporting to be certified, under the hand of the assistant registrar in Edinburgh, to be an extract of an entry in the register book of marriages kept in terms of the statute (17 & 18 Vict. c. 80). DREW *v.* DREW
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SETTLEMENT—Divorce—Wife's interest under will without power of anticipation—Jurisdiction—Forfeiture on alienation of interest—Effect of order for settlement - - - - - - - 222
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SHIPPING—*Collision—Action in rem—Foreign Defendants—Arrest—Bail—Voluntary Appearance—Personal Liability.*

The plaintiffs, owners of a British ship, commenced an action in rem and caused a vessel within the jurisdiction to be arrested in respect of a collision on the high seas. The owners of the vessel arrested were foreigners domiciled abroad. They appeared and obtained the release of their vessel by giving bail to the value of ship and freight. They then defended the action, denying their liability, and counterclaiming for the damage they had sustained by reason of the collision. The foreign vessel was found alone to blame, and judgment was pronounced in the usual form condemning the defendants and their bail in the amount of the damage sustained by the plaintiffs, together with the costs of the claim and counter-claim. The defendants moved to vary the decree by limiting it to the value of their vessel, freight, and costs :—

Held by the President (Sir Samuel Evans), following the principles laid down in the course of the judgment in *The "Dictator"* [1892] P. 304, approved by the Court of Appeal in *The "Gemma"* [1899] P. 285, that (apart from any application for a statutory limitation of liability), the appearance of the defendants being voluntary and their proceedings in the action amounting to a submission to the jurisdiction of the Court, they were personally liable to the full extent of the plaintiffs' proved claim. THE "DUPLEIX" - - **Samuel Evans, Pres. 8**

2. —— *Collision—Application of Maritime Conventions Act*, 1911 (*1 & 2 Geo. 5, c. 57*), *s. 9, sub-ss. 2, 3; s. 4, sub-s. 1—Merchant Shipping Act*, 1894 (*57 & 58 Vict. c. 60*), *s. 419, sub-s. 4.*

By s. 9, sub-s. 3, of the Maritime Conventions Act, 1911, the provisions of the Act "shall be applied in all cases heard and determined in any Court having jurisdiction to deal with the case . . . ."; but, by sub-s. 2, the Act "shall not apply in any case in which proceedings have been taken before the passing thereof . . . ."

Held by Bargrave Deane J., that the Act applied to an action of damage by collision, in which the proceedings had been (as in the case before the Court) taken after, though the cause of action arose before, the passing of the Act, and, therefore, the statutory presumption of fault, arising under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, could not be invoked, as it had been abolished by s. 4, sub-s. 1, of the Maritime Conventions Act. THE "ENTERPRISE" - - - **Bargrave Deane J. 207**

3. —— *Collision—Bow Creek—Rounding Bend—Relative Duties of Steam Vessels with and against the Tide—Good Seamanship.*

A collision occurred off Baldwin Point, Bow Creek, between the plaintiffs' barge, in tow of a tug, proceeding from the Thames up the creek with the tide, and the defendants' tug towing a barge down the creek against the tide. In the Court below the tug towing the plaintiffs' barge was found alone to blame for not giving the customary sound signal by way of warning before rounding the sharp bend which exists at that point :—

SHIPPING—*continued.*

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), that, apart from any alleged custom, good seamanship required that warning should have been given by the tug towing the plaintiffs' barge, and further that the defendants' tug was also to blame, for she approached the bend at such a speed that she could not stop in time to avoid collision with a vessel which might be on the other side but not visible owing to the sharpness of the corner. The "KENNET" - **Div. Ct. 114**

4. —— *Collision—Damage—Both to blame—Practice—Apportionment of Liability in Proportion to the Degree of Fault—Maritime Conventions Act*, 1911 (*1 & 2 Geo. 5, c. 57*), *s. 1—Costs.*

In an action of damage by collision between two steam vessels both were found to blame for navigating in a fog without proper regard to the regulations for preventing collisions at sea ; but the initial fault—without which there would probably not have been any collision—arose from the neglect of those in charge of the defendants' vessel to obey the rule requiring them to stop their engines on hearing a whistle on their starboard bow :—

Held by Bargrave Deane J., that in applying the provisions as to the division of loss, in cases of collision, contained in s. 1, sub-s. 1, of the Maritime Conventions Act, 1911, the justice of the case would be met by directing that the defendants' vessel should be liable for 60 per cent. of the damage sustained, leaving the plaintiffs' vessel liable for the remaining 40 per cent., with no order as to costs. THE "ROSALIA" **Bargrave Deane J. 109**

5. —— *Collision — Damage — Consequential Damage—Negligence of Plaintiff—Rule of Common Law or Admiralty—Costs—Public Authorities Protection Act*, 1893 (*56 & 57 Vict. c. 61*).

In an action brought against the Town Council of the borough of Sandwich to recover the amount of the original and consequential damage sustained by the plaintiff's steam launch as the result of a collision between the launch and the defendants' dredger, it appeared that both the plaintiff and the defendants had been guilty of negligence in respect of the original collision, but that blame could not be thrown upon any one in particular in respect of the consequential damage :—

Held by Bargrave Deane J., that the principles of the common law as to contributory negligence, and not the admiralty rule as to both to blame, applied, and as the plaintiff, the owner of the damaged steam launch, had been guilty of negligence in respect of the collision, the action ought not to have been brought, and, therefore, judgment must be given in favour of the defendants with "public authority" costs. THE "BLOW BOAT" - - - **Bargrave Deane J. 217**

6. —— *Collision—Damage—Personal Injury—Shock—Admiralty Court Act*, 1861 (*24 Vict. c. 10*), *s. 7—Workmen's Compensation Act*, 1906 (*6 Edw. 7, c. 58*), *s. 6.*

The plaintiffs, owners of a lightship stationed

SHIPPING—*continued.*

off the coast of Ireland, brought an action in rem, for damage by collision, against the defendants, owners of a sailing ship, which, during a fog, ran into the lightship. The defendants admitted liability for the damage sustained by the plaintiffs, except as to a claim for an indemnity in respect of a sum for which the plaintiffs had been held liable by reason of an award, under the Workmen's Compensation Act, 1906, making a weekly allowance, during incapacity, in favour of a seaman acting as cook and gunner on board the lightship at the time of the collision, and who, it was alleged, was suffering from shock due to fright caused by seeing the defendants' vessel looming out of the fog and bearing down upon the lightship :—

Held by Bargrave Deane J., confirming the report of the admiralty registrar, that, apart from technical objections arising from want of due notice, the damage was not "done by any ship" within the meaning of s. 7 of the Admiralty Court Act, 1861, and, therefore, as against the defendants, the owners of the sailing ship, the claim was too remote. THE "RIGEL"

Bargrave Deane J. 99

7. —— *Collision—Fog—Towage—Sound Signals—Tug fast but not towing—Regulations for Preventing Collisions at Sea, art.* 15 (*a*), (*e*)—*Division of Loss—Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1.

In an action of damage by collision, the defendant owners of a steam vessel charged those on board the plaintiffs' steam vessel, and her tug, with, inter alia, failing to sound their whistles for fog in accordance with the regulations for preventing collisions at sea :—

Held by the President (Sir Samuel Evans), that, though the tug was attached, by a short scope of rope, to the plaintiffs' steam vessel, she was not, either in law or in fact, towing, as the time had not yet arrived for her to take the vessel in tow, and, therefore, in the circumstances, she was not bound either to give the sound signals in fog for a separate vessel having way upon her, prescribed by art. 15 (*a*), or the signals for a vessel towing, prescribed by sub-s. (*e*) of the same article, and those in charge of the plaintiffs' vessel were justified, in the interests of safe navigation, in themselves giving the appropriate signals for a vessel under way.

In the result, as both the plaintiffs' and the defendants' vessels were found to blame for excessive speed, and the defendants' vessel in addition for bad look-out, and for not stopping in accordance with the rules, the degree of fault was apportioned as one third to two thirds, with no costs on either side. THE "SARGASSO"

Samuel Evans, Pres. 192

8. —— *Collision—Lights—Preliminary Act and Answers—Practice—Rules of the Supreme Court*, 1883, *Order XIX., r.* 28 (*k*), (*l*).

The particulars furnished by the defendants by way of answers to questions (k) ("the lights (if any) of the other vessel which were first seen" and (l) ("whether any lights of the other vessel, other than those first seen, came into view before the collision"), in the preliminary act, filed in an action for damage by collision, under Order XIX., r. 28, of the Rules of the Supreme Court, 1883, were as follows : To question (k), "The masthead, towing and both side lights of the *Tavistock*," and to question (l), "None" :—

Held by the President (Sir Samuel Evans), that the practice was wrong in that the answer to question (l) was not sufficiently explicit, as it did not state what other (if any) lights were seen and the precise alterations in the lights. The answer to question (l) ought to state what new combination of lights was seen after the first lights were observed. THE "MONICA"

Samuel Evans, Pres. 147

9. —— *Collision — Lightship — Practice — Value of Sunken Lightship—Inspection of Owners' Books—Rules of the Supreme Court, Order XXXI., r.* 18 (1.).

The plaintiffs' lightship, while at her station in the Mersey, was run into and sunk by the defendants' steamship. The defendants admitted liability, agreed to a reference, and applied for an order to inspect the plaintiffs' books with a view to ascertain the figures upon which the plaintiffs based the value they set upon their vessel :—

Held by the Court of Appeal (Fletcher Moulton and Buckley L.JJ.), reversing the decision of the Liverpool District Registrar and of Bargrave Deane J., that the defendants were entitled to an order for the production of the books forthwith, as the only material question was the value of the lightship at the date of the casualty, and it would assist the defendants if, before going to the reference, they were in possession of the figures relating to the original cost, and subsequent depreciation in value, of the lightship. THE "PACUARE" - **C. A. 179**

10. *Collision — Look-out — Sound Signals—Compulsory Pilotage—Assistance from Master.*

The defendants' steamship, proceeeding up the Mersey, ran into and damaged the plaintiffs' steamship, which was lying at anchor. The defence in substance was that those in charge of the plaintiffs' steamship improperly allowed a tug in attendance to exhibit a green light on the starboard side of their vessel, thereby leading those in charge of the defendants' vessel to believe that the plaintiffs' vessel was under way ; secondly, that if there was any negligence it was solely that of the pilot in charge by compulsion of law :—

Held by the President (Sir Samuel Evans that the defendants were liable as the plea of compulsory pilotage failed, for though the pilot was to blame for faulty navigation the blame did not rest solely with him, as the master of the defendants' vessel, who was, at the material time, on the bridge, acting as part of the look-out, had appreciated, in sufficient time, that the plaintiffs' vessel was at anchor, but had not (as required by *The* "*Tactician*" [1907] P. 244) pressed upon the attention of the pilot that he was navigating the vessel under an erroneous impression as to the meaning of the green light which properly indicated that the tug was not attached to the plaintiffs' vessel, but was, in

SHIPPING—*continued.*

fact, stemming the tide whilst waiting for orders. Secondly—on the point left open in *The "St. Paul"* [1909] P. 43, as to the responsibility of master or pilot in respect of the giving of sound signals—that the collision might have been avoided if the defendants' master had drawn the attention of the pilot to the omission to direct the giving of the appropriate sound signals on each alteration of the helm, as the vessel at anchor would probably then have given some indication by way of warning of the danger the defendants' vessel was incurring. THE "ELYSIA" - **Samuel Evans, Pres. 152**

11. —— *Collision—Loss of Life—Limitation of Time—The Fatal Accidents Act* (*Lord Campbell's Act*), 1846 (9 *&* 10 *Vict. c.* 93), *s.* 3—*Maritime Conventions Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 8.

A claim against a vessel, or her owners, for damages for loss of life may, under s. 8 of the Maritime Conventions Act, 1911, be brought within two years from the date when the loss was caused, notwithstanding the provisions of the Fatal Accidents Act, 1846, by which an action to recover damages for loss of life must be commenced within twelve calendar months after the death of the deceased person. THE "CALIPH" - - **Bargrave Deane J. 213**

12. —— *Collision — Thames (River) — Port of London — Compulsory Pilotage — General Pilotage Act*, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59.

The defendants' steam vessel, belonging to the port of London, whilst proceeding, in charge of a duly licensed Trinity House pilot, down the river Thames, bound from London to East Africa with cargo and passengers, came into collision, through the fault of the pilot alone, with some tugs and barges of the plaintiffs in Bugsby's Reach :—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), affirming the decision of Sir Samuel Evans, President ([1911] P. 234), that the defendants were not liable for the damage sustained by the plaintiffs, as pilotage was compulsory, the port of London, within which the collision occurred, being a port in relation to which particular provision, for the appointment of pilots, had been made by charter and by Act of Parliament, within the meaning of 6 Geo. 4, c. 125, s. 59.

The "Hankow" (1879) 4 P. D. 197, followed. THE "UMSINGA" - - - - **C. A. 120**

13. —— *Collision—Thames (River)—Steam Vessel aground — Sound Signals — Lights — Thames By-laws*, 1898, *arts.* 30, 40, 52.

The Thames By-laws, 1898, are defective in not sufficiently indicating the signals to be given, or lights to be exhibited, by a vessel temporarily aground, as a warning to other vessels to keep clear. THE "BROMSGROVE" **Bargrave Deane J. 182**

14. —— *Collision—Thames (River)—Vessel aground at Night—Lights—Thames By-laws*, 1898, *art.* 30—*Regulations for Preventing Collisions at Sea*, *art.* 11.

So far as relates to the lights to be carried by a vessel of 150 feet or upwards in length "aground in or near a fairway," there is no ambiguity in art. 30 of the Thames By-laws, 1898, for it may be gathered from the earlier part of the same article that a vessel of that length is required to carry two white lights at the height and in the positions indicated, nor is the article ultra vires, for, in accordance with the reasoning in *The "Carlotta"* [1899] P. 223, this by-law, having been duly made by local authority, excludes the operation of art. 11 of the regulations for preventing collisions at sea, by which, in the case of vessels over 150 feet in length, aground in or near a fairway, two red lights are to be carried in addition to the white lights. THE "BITINIA" - - **Bargrave Deane J. 186**

15. —— *Collision—Tug and Barge in tow—Third Vessel—Tow in Collision with Third Vessel—Tug and Third Vessel to blame—Non-liability of Tow—Tow entitled to whole Damages from Third Vessel—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9—*Preliminary Act.*

In two separate actions of damage by collision brought, in the one case, by the plaintiff owners of a barge and her master and crew, suing for the loss of their effects, and the owners of her cargo and freight, against the defendant owners of another vessel, and, in the second case, by the plaintiff owners of a barge and her master and mate, suing for the loss of their effects, against the defendant owners of another vessel, the same facts were found by the Court, namely, that a barge carrying cargo, manned by two hands, and provided with a rudder, whilst being towed in the Mersey by a tug which had the control of the navigation, came into collision with, and was sunk by, a third vessel through the joint negligence of the tug and the third vessel, the barge, in each case, though in collision with the third vessel, being free from fault :—

Held by the Court of Appeal (Fletcher Moulton and Buckley L.JJ., Vaughan Williams L.J. dissenting), that the Admiralty rule as to division of loss, preserved by the Judicature Act, 1873, s. 25, sub-s. 9, only applied to the case of "collision between two ships if both ships shall be found to have been in fault," and therefore the cases were governed by the common law, under which one of two joint tortfeasors can be sued separately, the result being that, in each case, the defendants were liable for the whole of the loss sustained by the plaintiffs.

Per Fletcher Moulton L.J. : A statement of fact in a preliminary act is a formal admission binding the party making it, and can only be departed from by special leave.

See also a report of *The "Devonshire" and "St. Winifred"* as a note at p. 68 of the above case. THE "SEACOMBE." THE "DEVONSHIRE" - - - - - - **C. A. 21**

16. —— *County Court—Jurisdiction—"Collision"—Damage by Ship to Buoy—County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty*

SHIPPING—*continued.*

Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.

The word "collision" in s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868, is limited to collision between ships, and, therefore, a county court has no admiralty jurisdiction in respect of damage done by a ship to a floating gas buoy.

The "Normandy" [1904] P. 187, followed. THE "UPCERNE" - - - **Div. Ct. 160**

17. —— *Pilotage—Exemption—"Navigation in ballast"—Coals as Stores—Order in Council, July* 25, 1861.

A steam vessel of 7600 tons gross register, and 1538 tons water ballast capacity, left Newcastle-upon-Tyne for Port Chalmers, New Zealand, via London, having on board, in addition to 710 tons water ballast, 3040 tons of coal for her own use on the voyage. Whilst proceeding up the Thames she ran into and damaged a pier at Purfleet, and her owners, on being sued by the pier owners, set up compulsory pilotage as a defence :—

Held by Bargrave Deane J., that the vessel was exempt, as she was not carrying passengers, or freight earning cargo, the coals being "stores," and she was, therefore, "navigating in ballast," from a port or place in the United Kingdom to another port or place in the United Kingdom, within the meaning of the Trinity House by-law, approved by Order in Council of July 25, 1861. THE "TONGARIRO" - **Bargrave Deane J. 297**

18. —— *Salvage—Loss of Fishing by Trawler Salvors.*

Prospective damage in the shape of loss of fishing, as distinguished from actual damage sustained by a salvor in rendering salvage services, will be recognized by the Court, but not directly taken into account in making a salvage award. THE "FAIRPORT"

Bargrave Deane J. 168

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1825.

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1846.

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1854.

17 & 18 Vict. c. 80, s. 58—*Registration of Births, &c. (Scotland)* - - - **175**
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1856.

19 & 20 Vict. c. 96, s. 2—*Marriage Law (Scotland) Amendment* - - - **175**
See SCOTTISH LAW.

1857.

20 & 21 Vict. c. 85, s. 31—*Matrimonial Causes* - - - - - - **201**
See DIVORCE. 3.

—— —— s. 45 - - - - - - **222**
See DIVORCE. 9.

1859.

22 & 23 Vict. c. 61, s. 5—*Matrimonial Causes* **222**
See DIVORCE. 9.

1861.

24 Vict. c. 10, s. 7—*Admiralty Court* - **99**
See SHIPPING. 6.

1868.

31 & 32 Vict. c. 71, s. 3, sub-s. 3—*County Courts Admiralty Jurisdiction* - **160**
See SHIPPING. 16.

1869.

32 & 33 Vict. c. 51, s. 4—*County Courts Admiralty Jurisdiction Amendment* **160**
See SHIPPING. 16.

32 & 33 Vict. c. 68, s. 3—*Evidence* - - **19**
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1870.

33 & 34 Vict. c. 75, ss. 7, 23—*Education* - **69**
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1873.

36 & 37 Vict. c. 66, ss. 19, 47—*Judicature* **241**
See DIVORCE. 4.

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1893.

56 & 57 Vict. c. 61—*Public Authorities Protection* - - - - - **217**
See SHIPPING. 5.

1894.

57 & 58 Vict. c. 60, s. 419, sub-s. 4—*Merchant Shipping* - - - - **207**
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1902.

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1906.

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—— —— s. 9, sub-ss. 2, 3; s. 4, sub-s. 1 207
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—— Ship—Collision—Fog—Towage—Sound signals—Tug fast but not towing—Division of loss—Maritime Conventions Act, 1911 - - - - 192
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